Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
International Settlements Policy Reform	)	IB Docket No 11-80
	)	
Joint Petition for Rulemaking of AT&T Inc., Sprint Nextel Corporation and Verizon	)	RM-11322
	)	
Modifying the Commission's Process to Avert Harm to U.S. Competition and U.S. Customers Caused by Anticompetitive Conduct	)	IB Docket No. 05-254
	)	
Petition of AT&T for Settlements Stop Payment Order on the U.S.-Tonga Route	)	IB Docket No. 09-10

NOTICE OF PROPOSED RULEMAKING

Adopted: May 12, 2011 **Released: May 13, 2011**

Comment Date: (30 days after publication in the Federal Register)
Reply Comment Date: (45 days after publication in the Federal Register)

By the Commission: Chairman Genachowski and Commissioners Copps, McDowell, and Clyburn issuing separate statements. Commissioner Baker not participating.

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I. INTRODUCTION

1. In this Notice of Proposed Rulemaking, we propose to further deregulate the international telephony market and enable U.S. consumers to enjoy competitive prices when they make calls to international destinations. First, we propose to remove the International Settlements Policy (ISP) from the few dozen international routes to which it continues to apply.[1] The ISP has been a longstanding Commission policy that has promoted and protected competition and been instrumental in the continued reduction of international telephone rates. Now, it appears that its retention may be unnecessarily burdensome on U.S. carriers in negotiating agreements to achieve these goals. Eliminating the ISP will enable more market-based arrangements between U.S. and foreign carriers on all U.S. international routes. Second, we seek comment on a proposal to enable the Commission to better protect U.S. consumers from the effects of anticompetitive conduct by foreign carriers in instances necessitating Commission intervention. Specifically, we seek comments on proposals and issues regarding the application of the Commission's benchmarks policy.

2. We incorporate by reference the records previously established in connection with the 2006 Joint Petition for Rulemaking filed by three U.S. carriers requesting the Commission to remove the ISP from the remaining international routes to which it applies,[2] and the 2005 Notice of Inquiry released by the Commission seeking comment on ways to improve the process by which the Commission protects consumers from the effects of anticompetitive conduct by foreign carriers.[3] In addition, we incorporate by reference the record established in response to the International Bureau's request for comment on AT&T's request in Docket No. 09-10 that all U.S. carriers pay no more than the $0.19 benchmark rate for all U.S.-Tonga traffic, including third-country reorigination traffic.[4]

II. BACKGROUND

A. ISP and Benchmarks

3. The Commission established the ISP to govern how U.S. carriers negotiate with foreign carriers for the exchange of international traffic, and it is the structure by which the Commission has sought to respond to concerns that foreign carriers with market power are able to take advantage of the presence of multiple U.S. carriers serving a particular market.[5] The Commission established the ISP to

[1] We propose to exclude one international route from the amendments we propose in this Notice of Proposed Rulemaking. That route is currently listed in the Commission's "Exclusion List," as discussed below in ¶ 13.

[2] *Joint Petition for Rulemaking to Further Reform the International Settlements Policy*, RM-11322 (filed by AT&T Inc., Sprint Nextel Corporation and Verizon on March 13, 2006) (*Joint Petition*); *Joint Petition for Rulemaking to Further Reform the International Settlements Policy*, Public Notice, RM-11322, Report No. 2764 (rel. March 21, 2006) (*Joint Petition Public Notice*).

[3] *See Modifying the Commission's Process to Avert Harm to U.S. Competition and U.S. Customers Caused by Anticompetitive Conduct*, IB Docket No. 05-254, Notice of Inquiry, FCC 05-152, 20 FCC Rcd 14096, 14096, ¶ 1 (*2005 NOI*).

[4] *See Petition of AT&T Inc. for Settlements Stop Payment Order on the U.S.-Tonga Route*, IB Docket No. 09-10, Second Order and Request for Further Comment, DA 09-2422, 24 FCC Rcd 13769 (rel. Nov. 16, 2009).; *see also Petition of AT&T Inc. for Settlements Stop Payment Order on the U.S.-Tonga Route,* IB Docket No. 09-10, Order and Request for Further Comment, DA 09-1325, 24 FCC Rcd 8006 (IB 2009) (*Tonga Stop Payment Order*).

[5] *See International Settlements Policy Reform; International Settlement Rates,* IB Docket Nos. 02-324, 96-261, First Report and Order, FCC 04-53, 19 FCC Rcd 5709, 5713-15, ¶¶ 9-12 (2004) (*2004 ISP Reform Order*); *In the Matter of Market Entry and Regulation of Foreign-Affiliated Entities,* IB Docket No. 95-22, Report and Order, FCC 95-475, 11 FCC Rcd 3873 (1995) (*Foreign Carrier Entry Order*) at 3877, ¶ 6. *See also International Settlements Policy Reform; International Settlement Rates, IB Docket Nos. 02-324, 96-261, NPRM*, FCC 02-285,17 FCC Rcd 19954,

(continued....)

prevent foreign carriers with market power from discriminating against or using threats of discrimination or other anticompetitive actions against competing U.S. carriers as a strategy to obtain pricing concessions regarding the exchange of international traffic.[6] Specifically, the ISP requires that: (1) all U.S. carriers must be offered the same effective accounting rate and same effective date for the rate ("nondiscrimination"); (2) all U.S. carriers are entitled to a proportionate share of U.S.-inbound, or return traffic based upon their proportion of U.S.-outbound traffic ("proportionate return"); and (3) the accounting rate is divided evenly 50-50 between U.S. and foreign carriers for U.S.-inbound and outbound traffic so that inbound and outbound settlement rates are identical ("symmetrical settlement rates").[7] In addition to the ISP, the Commission also adopted the "No Special Concessions" rule and certain filing

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19955, ¶ 1 n.1 (*ISP NPRM*). The ISP was formerly termed the Uniform Settlements Policy, or USP, and dates back to the 1930s. The USP initially applied to telegraph and telex services and evolved through Commission decisions and practices. The intent of the USP was to ensure that U.S. carriers were treated fairly and that U.S. customers received the benefits that result from the provision of international services on a competitive basis. Among other things, the policy required uniform accounting rates and uniform terms for sharing of tolls. *See, e.g., Mackay Radio and Telegraph Co.,* 2 FCC 592 (Telegraph Committee 1936) (denying an application for Section 214 authority to serve Norway because the settlement terms would have permitted the Norwegian carrier to "whipsaw," or engage in anticompetitive behavior against, U.S. carriers by manipulating traffic flows and retaining a greater percentage of the accounting rate), *aff'd sub nom. Mackay Radio v. FCC*, 97 F.2d 641 (D.C. Cir. 1938); *Modifications of Licenses in the Fixed Public and Fixed Public Press Services*, 11 FCC 1445 (1946); *Mackay Radio and Telegraph Company,* 25 FCC 690 (1951), *rev'd on other grounds sub nom. RCA Communications, Inc. v. FCC*, 210 F.2d 694 (D.C. Cir. 1952), *vacated and remanded,* 346 U.S. 86 (1953); *TRT Telecommunications Corp.,* 46 FCC 2d 1042 (1974). In 1986, the Commission termed the USP the "ISP" and extended its application to International Message Telephone Service (IMTS) in response to significantly greater reported instances of anticompetitive behavior. The Commission also streamlined the filing of accounting rate modifications and chose not to apply the ISP to enhanced services. *See ISP Order*, 51 Fed. Reg. 4736; *modified in part on recon.,* Order on Reconsideration, 2 FCC Rcd 1118 (1987) (*ISP Recon Order*); Further Reconsideration, 3 FCC Rcd 1614 (1988) (*ISP Further Recon*).

[6] Certain forms of anticompetitive activity can be referred to as "whipsawing," generally defined as a broad range of anticompetitive behavior by foreign carriers that possess market power, in which the foreign carrier or a group of foreign carriers exploit that market power in negotiating settlement rates with competitive U.S. telecommunications carriers. For example, the Commission has found "whipsawing" to have occurred when a foreign carrier or foreign carriers acting in concert have demanded increases in settlement rates and blocked the circuits of any U.S. carrier that refuses to agree to the demanded rate increases. *See, e.g.*, *AT&T Corp. Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief and Petition of WorldCom, Inc. for Prevention of "Whipsawing" On the U.S.-Philippines Route*, IB Docket No. 03-38, Order on Review, FCC 04-112, 19 FCC Rcd 9993 (2004) (*Philippines Order on Review*); *AT&T Corp. Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief and Petition of WorldCom, Inc. for Prevention of "Whipsawing" On the U.S.-Philippines Route*, IB Docket No. 03-38, Order, 18 FCC Rcd 3519 (Int. Bur. 2003) (*2003 Philippines Order*). *See also AT&T Corp. Proposed Extension of Accounting Rate Agreement for Switched Voice Service with Argentina,* ISP-96-W-062, Order, 11 FCC Rcd 18014, 18014, ¶ 1 (Int. Bur. 1996) ("The Commission will not allow foreign monopolists to undermine U.S. law, injure U.S. carriers or disadvantage U.S. consumers.") (*Argentina Order*); *Sprint Communications Company, L.P. Request for Modification of the International Settlements Policy to Change the Accounting Rate for Switched Voice Service with Mexico,* ISP-97-M-708, Memorandum Opinion and Order, 13 FCC Rcd 24998, 25000-02, ¶ 6-9 (Int. Bur. 1998) (*Mexico Order*); *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224, 1226-1227 (D.C. Cir. 1999) ("The FCC has long sought to protect U.S. carriers and U.S. consumers from the monopoly power wielded by foreign telephone companies in the international telecommunications market.") (*Cable & Wireless*); *see, e.g., Atlantic Tele-Network, Inc. Application for Authority to Acquire and Operate Facilities for Direct Service Between the U.S. and Guyana*, Order on Review, FCC 93-342, 8 FCC Rcd 4776 (1993).

[7] 47 C.F.R. § 43.51.

requirements, which serve as safeguards against non-price discrimination and reinforce the ISP conditions.[8]

4. Because settlement rates remained substantially above cost despite efforts to promote competition through reform of the ISP, the Commission decided in 1997 in its *Benchmarks Order* to establish benchmarks that govern the international settlement rates that U.S. carriers may pay foreign carriers to terminate international traffic from the United States.[9] The policy requires U.S. carriers to negotiate settlement rates at or below benchmark levels established by the Commission.[10] The *Benchmarks Order* divided countries into five groups, based on economic development levels as determined by information from the International Telecommunication Union (ITU) and the World Bank.[11] The Commission established benchmark settlement rates—above which U.S. carriers must not pay foreign carriers—of $0.15 per minute for upper income countries; $0.19 for upper middle income and lower middle income countries; and $0.23 for low income countries.[12] The Commission established its benchmarks policy with the goal of reducing above-cost settlement rates paid by U.S. carriers to foreign carriers for the termination of international traffic, where market forces had not led to cost-based settlement rates.[13] The Commission has consistently stated that it expects U.S. consumers to receive the benefit of settlement rate savings by carriers.[14]

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[8] 47 C.F.R. § 63.14. The "No Special Concessions" rule prohibits exclusive arrangements between a U.S. carrier and a foreign carrier with market power that involve services, facilities, or functions on the foreign end of a U.S. international route that are necessary for the provision of basic telecommunications services where the arrangement is not offered to similarly situated U.S. carriers. 47 C.F.R. § 63.14. Generally, special concessions between U.S. and foreign carriers with market power pose an unacceptable risk of anticompetitive harm in the U.S. international services market. Special concessions between U.S. carriers and foreign carriers that lack market power, on the other hand, may permit carriers to offer innovative services that result in lower rates to U.S. customers. *Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket Nos. 97-142 and 95-22, Report and Order and Order on Reconsideration, FCC 97-398, 12 FCC Rcd 23891 at 23957-65, ¶¶ 156-170 (1997) (*Foreign Participation Order*). The Commission narrowed the application of the "No Special Concessions" rule in the *1999 ISP Reform Order* by partially removing the rule as it applies to terms and conditions *under which traffic is settled*, including the allocation of return traffic or "grooming" arrangements, on a route where the Commission removes the ISP. For example, the "No Special Concessions" rule still applies to terms and conditions unrelated to the settlement of traffic, such as interconnection of international facilities, private line provisioning and maintenance, and quality of service on routes where the ISP is lifted. *See 1998 Biennial Regulatory Review -- Reform of the International Settlements Policy and Associated Filing Requirements*, IB Docket 98-148 and 95-22, CC Docket 90-337 (Phase II), Report and Order and Order on Reconsideration, FCC 99-73, 14 FCC Rcd 7963, 7994-98, ¶¶ 82-94 (1999) (*1999 ISP Reform Order*). *See also Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 97-142, Order on Reconsideration, FCC 00-339, 15 FCC Rcd 18158 (2000) (*Foreign Participation Recon Order*).

[9] *See, e.g.*, *In the Matter of International Settlement Rates*, IB Docket No. 96-261, Report and Order, FCC 97-280, 12 FCC Rcd 19806, ¶ 1 (1997) (*Benchmarks Order*); Report and Order on Reconsideration and Order Lifting Stay, 14 FCC Rcd 9256 (1999) (*Benchmarks Reconsideration Order*); *aff'd sub nom. Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999).

[10] *See, e.g., Benchmarks Order*, 12 FCC Rcd at 19860, ¶ 111.

[11] *See Benchmarks Order*, 12 FCC Rcd at 19965-66, Appendix C.

[12] *See Benchmarks Order*, 12 FCC Rcd at 19861, ¶ 111.

[13] *Id.* at 19862-63, ¶ 115. The Commission concluded that the benchmark rates are necessary because, under the current international accounting rate system, the settlement rates U.S. carriers pay foreign carriers to terminate U.S.-originated traffic are, in most cases, substantially above the costs foreign carriers incur to terminate that traffic. *Benchmarks Reconsideration Order*, 14 FCC Rcd at 9256, ¶ 3.

[14] *Benchmarks Order*, 12 FCC Rcd at 19930-32, ¶¶ 270-74 ("We expect to see U.S. carriers pass on to consumers the savings in net settlements payments on a route-by-route basis because settlement costs, and consequently,

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5. The *Benchmarks Order* became effective in 1998 with the first of the series of benchmark rates becoming effective for upper income countries on January 1, 1999. Since then, both U.S. international average settlement rates and average IMTS revenue per minute have dropped dramatically. Average settlement rates have decreased from $0.35 per minute (1997) to $0.05 per minute (2009) and average IMTS revenue per minute has decreased from $0.67 per minute (1997) to $0.08 per minute (2009). Currently, more than 97.9% of the approximately 73.2 billion settled U.S. international minutes, representing at least 165 of the 203 countries with which U.S. carriers correspond, are being settled at or below the relevant benchmark rate. As a result of these three policies – the ISP, the Benchmarks Policy, and the "No Special Concessions" rule – the international payments U.S. carriers have made to foreign carriers for termination of U.S. international traffic have decreased dramatically. In 1997, one year before the first benchmark rate took effect, U.S. carriers paid foreign carriers $5.6 billion in net settlement payments for termination of U.S. international calls. In 2009, U.S. carriers paid foreign carriers approximately $3.6 billion (a decrease of 36 percent). During that time, U.S.-billed international calling minutes increased from 22.8 billion minutes to 72.9 billion minutes, an increase of 220 percent (calling minutes increased by over 250 percent since 1996, before the Commission adopted its *Benchmarks Order*). Net settlement payments per minute, therefore, decreased from $0.25 per minute to $0.05 per minute (a decrease of 80 percent).[15]

6. As the U.S. international market and foreign markets have become more competitive and settlement rates have decreased to benchmark rates or below, the Commission has exempted certain international routes from application of the ISP. In its *2004 ISP Reform Order*, the Commission decided to retain its benchmarks policy but recognized that the restrictions of the ISP that are intended to protect the public interest may, in reality, hinder the ability of U.S. carriers to negotiate lower settlement rates and more efficient terms in their agreements with foreign carriers under certain circumstances.[16] Indeed, because the ISP focuses on creating a unified bargaining position for U.S. carriers, it denies U.S. carriers the ability to respond quickly to changing conditions in the global telecommunications marketplace by preventing carriers from negotiating responsive and flexible agreements with individualized rates and terms.[17] Thus, in the *2004 ISP Reform Order*, the Commission reformed its U.S. international regulatory policies to reflect increased competition on many U.S. international routes accompanied by lower settlement rates and calling prices for U.S. consumers.[18] In particular, the Commission exempted benchmark-compliant international routes from the ISP to give U.S. carriers greater flexibility to negotiate market-based arrangements on these routes.[19] The Commission subsequently lifted the ISP

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savings, are incurred on a route-by-route basis."); *Benchmarks Reconsideration Order*, 14 FCC Rcd at 9256 ¶ 4 ("As accounting rates are reduced, the cost to U.S. carriers of providing international service will decrease. U.S. consumers should see the benefits of such cost reductions in the form of lower prices for international service.").

[15] Information based upon FCC, Section 43.61 International Telecommunications Data, 1997 and 2009 data. We note that although the Commission has stated that escalating net settlement payments are a problem, the Commission's concern is not with the absolute level of U.S. net settlement payments, but rather with the extent to which those payments reflect rates that exceed the underlying costs of providing international termination services. *See Benchmarks Order*, 12 FCC Rcd at 19822-23, ¶ 36. We fully expect that U.S. carriers may make increased outpayments to foreign carriers if accounting rates decrease and calling prices fall, causing traffic volumes and minute imbalances to arise. *Id.* at 19878-79, ¶ 149.

[16] *See 2004 ISP Reform Order,* 19 FCC Rcd at 5716, ¶ 13. *See also, e.g., Flexibility Order,* 11 FCC Rcd 20069-73, ¶13-27; *ISP Reform NPRM,* 13 FCC Rcd 15320, ¶¶ 9-11; *1999 ISP Reform Order,* 14 FCC Rcd 7972-73, ¶¶ 24-28.

[17] *ISP NPRM*, 17 FCC Rcd at 19968, ¶ 21.

[18] *See 2004 ISP Reform Order*, 19 FCC Rcd 5709.

[19] *Id.* at 5711, ¶ 2; 47 C.F.R. § 64.1002.

from additional routes that were certified to be benchmark compliant.[20] There are currently 165 U.S. international routes to which the ISP no longer applies, and only 38 U.S. international routes that remain subject to the ISP.[21] The 38 routes constitute 1.8% of total minutes worldwide based on 2009 data.[22]

B. Competitive Safeguards

7. Although the Commission sought to permit greater flexibility in commercial negotiations on benchmark-compliant routes, it retained two additional safeguards to protect competition: the "No Special Concessions" rule, which serves as a safeguard against non-price discrimination, and its contract filing requirements to reinforce the ISP conditions on the remaining routes subject to the ISP.[23] The Commission also concluded that other safeguards are necessary to allow it to respond to anticompetitive conduct on individual U.S. international routes as discussed below.[24] Accordingly, the Commission adopted procedures in the *2004 ISP Reform Order* that allow the Commission to address specific allegations of such conduct by foreign carriers.[25]

8. In addition to the *1997 Benchmarks Order* and the *2004 ISP Reform Order*, the Commission has taken action in specific cases to protect U.S. consumers from anticompetitive conduct on U.S. international routes. In 2003, the Commission required U.S. carriers to suspend payments to certain foreign carriers that had disrupted circuits in the Philippines in an attempt to force higher settlement rates.[26] Since then, there have been instances in which U.S. carriers have reported that certain foreign carriers, in some instances with the implicit support of their governments, have demanded non-cost-based rate increases, set rate floors, or otherwise engaged in anticompetitive behavior on a number of U.S. international routes where there is little or no competition on the foreign end.[27] Foreign carriers, on

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[20] *See U.S.-Cambodia Route Exempted from the International Settlements Policy,* Public Notice, IB Docket Nos. 02-324, 96-261, 20 FCC Rcd 14837 (rel. Sept. 23, 2005); *U.S.-Angola Route Exempted from the International Settlements Policy,* Public Notice, IB Docket Nos. 02-324, 96-261, 19 FCC Rcd 24056 (rel. Dec. 14, 2004); *Additional U.S. International Routes Exempted from the International Settlements Policy*, Public Notice, 19 FCC Rcd 22032 (2004); *Commission Lifts the International Settlements Policy on Certain Benchmark Compliant Routes, Seeks Further Comment on Other Routes,* Public Notice, IB Docket Nos. 02-324, 96-261, 19 FCC Rcd 20469 (rel. Aug. 31, 2004).

[21] *See* http://www.fcc.gov/ib/pd/pf/isp_exempt.html and http://www.fcc.gov/ib/pd/pf/isp_non_exempt.html.

[22] *See* 2009 Annual Section 43.61 Traffic Report.

[23] *See supra* n.11. The pertinent contract filing requirements are codified in section 43.51 of the Commission's rules. 47 C.F.R. § 43.51.

[24] *See 2004 ISP Reform Order*, 19 FCC Rcd at 5729, ¶ 40; 47 C.F.R. § 64.1002(d).

[25] *See id*. at 5730-32, ¶¶ 43-52.

[26] In 2003, certain Philippines carriers disrupted the circuits on the U.S.-Philippines route of those U.S. carriers that did not agree to the demanded settlement rate increases. In response to petitions filed by U.S. carriers alleging anticompetitive conduct on the part of the Philippine carriers and in order to promote the public interest, the International Bureau, among other things, directed all U.S. carriers that provide facilities-based services to suspend payments to the Philippine carriers for terminating services until those carriers restored U.S. carriers' circuits. *Philippines Order on Review*, 19 FCC Rcd 9993; *2003 Philippines Order*, Order, 18 FCC Rcd 3519 (2003).

[27] *See, e.g.,* Letter from Alexandra Field, Director, International Affairs, Law and Public Policy, MCI Corporation, David Nall, General Attorney, Sprint Corporation, and Douglas Schoenberger, Director, International Government Affairs, AT&T Corporation, to Donald Abelson, Chief, International Bureau, FCC (Feb. 4, 2005) (Nicaragua Letter); Letter to Mary Hoberman, Director, International Public Policy, AT&T Wireless, from Phillip Paulwell, Minister, Ministry of Commerce, Science and Technology, Jamaica at 4 (May 24, 2005) (Jamaica Letter) (noting that "a universal service charge was imposed on all carriers of international calls to Jamaica"). In the *2004 ISP Reform Order* docket, U.S. carriers explained that certain foreign carriers, and at least on some instances with the implicit support of their governments, have demanded rate increases, "whipsaw-type" behavior, or "rate floors" on a number of U.S. international routes where there is little or no competition on the foreign end. AT&T Comments at

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occasion, have also blocked international phone circuits, in some instances with the alleged support and endorsement of their respective governments and regulators, as a negotiating tactic to obtain higher interconnection rates from U.S. carriers.[28]

9. In 2005, the Commission issued a Notice of Inquiry that sought comment on ways to improve the process available to the Commission to protect U.S. consumers from the effects of anticompetitive conduct by foreign carriers.[29] Several carriers and other entities filed comments[30] and replies.[31] In 2006, AT&T, Sprint Nextel and Verizon filed a *Joint Petition for Rulemaking* requesting that the Commission remove the ISP requirements from the remaining international routes that are subject to the ISP.[32]

10. Most recently, the International Bureau responded to the disruption of U.S. international networks of AT&T and Verizon following a nearly three-fold, above-benchmark increase in termination rates on the U.S.-Tonga route. It granted a petition filed by AT&T Inc. (AT&T) and supported by Verizon Communications Inc. (Verizon) seeking protection from and remedies to the disruption of circuits on the U.S.-Tonga route. The Bureau found that actions taken by the Tonga Communications Corporation (TCC) to disrupt the U.S. international networks of AT&T and Verizon, for the purpose of trying to force those carriers to agree to higher termination rates, are anticompetitive and require action to protect U.S. consumers in accordance with Commission policy and precedent. The Bureau ordered all U.S. carriers with Commission authorizations permitting the provision of facilities-based international switched voice services on the U.S.-Tonga route to suspend immediately all U.S. carrier payments for termination services to TCC.[33] On November 16, 2009, the International Bureau released an order

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2-3, 19 and Reply at 4, 9, 11-12; MCI Comments at 4, 9-11 (Verizon subsequently acquired MCI); Sprint Comments at 5-6; CompTel Reply at 4.

[28] *See, e.g.,* Letter from James J.R. Talbot, Senior Attorney, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission at 7 (filed Jun. 24, 2005) (Ecuador Letter) (noting that "U.S. to Ecuador mobile terminating traffic has been disrupted since March 2005 because AT&T and other carriers would not agree to a non-cost justified mobile termination rate increase in excess of 100% from the existing rate agreement"); Jamaica Letter at 4 (warning that "it is likely that [Jamaican] carriers who fail to secure rate changes before June 1, 2005, will block the international circuits in order to ensure that their licenses are not placed at risk"); Statement by the Minister of Commerce, Science and Technology Hon. Phillip Paulwell to News Conference on the Establishment of Universal Service Fund (May 17, 2005), at http://www.mct.gov.jm/phillip%20press%20conference %20ufs.pdf; Nicaragua Letter; Letter from Sasha Field, Director, International Affairs, Law and Public Policy, MCI Corporation, David Nall, General Attorney, Sprint Corporation, and Douglas Schoenberger, Director, International Government Affairs, AT&T Corporation, to Donald Abelson, Chief, International Bureau, FCC (May 25, 2005).

[29] *See Modifying the Commission's Process to Avert Harm to U.S. Competition and U.S. Customers Caused by Anticompetitive Conduct,* IB Docket No. 05-254, Notice of Inquiry, FCC 05-152, 20 FCC Rcd 14096 (2005).

[30] *See* AT&T Comments, Cable & Wireless Jamaica Ltd. Comments, CANTO Comments, Digicel USA Inc. and Mossel (Jamaica) Inc. Comments, Jamaican Ministry Comments, JCTA and Reliant Comments, Malaysian Communications and Multimedia Commission Comments, MCI Comments, Sprint Nextel Corporation Comments.

[31] *See* AT&T Reply, CANTO Reply, Cable & Wireless Jamaica Ltd. Reply, JCTA and Reliant Reply, MCI Reply, Sprint Nextel Corporation Reply.

[32] *Joint Petition for Rulemaking to Further Reform the International Settlements Policy*, RM-11322 (filed by AT&T Inc., Sprint Nextel Corporation and Verizon on March 13, 2006) (*Joint Petition*); *Joint Petition for Rulemaking to Further Reform the International Settlements Policy*, Public Notice, RM-11322, Report No. 2764 (rel. March 21, 2006) (*Joint Petition Public Notice*).

[33] *Petition of AT&T Inc. for Settlements Stop Payment Order on the U.S.-Tonga Route,* IB Docket No. 09-10, Order and Request for Further Comment, 24 FCC Rcd 8006 (Int. Bur. 2009) (*Tonga Stop Payment Order*). Specifically, the Bureau found that TCC did not overcome the rebuttable presumption that disruption of U.S. carrier networks by foreign carriers to achieve rate increases harms the public interest. The Bureau rejected TCC's argument that,
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requiring all facilities-based carriers subject to Commission jurisdiction having an operating agreement with Digicel Tonga Limited for direct termination of U.S. traffic on the U.S.-Tonga route to suspend all termination payments to Digicel for switched voice service.[34] Tonga subsequently officially removed its minimum termination rate effective April 1, 2010. However, AT&T and Verizon circuits on the U.S.-Tonga route remain down pending negotiations between U.S. carriers and TCC.[35]

III. DISCUSSION

11. In this NPRM, we propose to remove the ISP from all U.S. international routes except Cuba. Further, we seek comment on ways for the Commission to improve its rules and procedures to enhance its ability to prevent and respond to anticompetitive behavior by foreign carriers in a timely and effective manner. Specifically, we seek comment on issues and proposals related to the Commission's benchmarks policy and competitive safeguards against anticompetitive behavior.

A. Joint Petition for Rulemaking of AT&T Inc., Sprint Nextel Corporation and Verizon

12. The Commission issued a public notice requesting comment on the *Joint Petition* on March 20, 2006 proposing that the Commission lift the ISP from all remaining routes still subject to this regulation.[36] No oppositions or comments were filed in response to the notice. The *Joint Petition* argues that removing the ISP would encourage lower rates and more flexible and innovative arrangements on all international routes.[37] The *Joint Petition* also contends that remaining competitive concerns can be addressed through the Commission's competitive safeguards.[38] Finally, the *Joint Petition* states that

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because the Tonga Communications Minister required TCC to impose a rate increase, this Commission can neither find TCC's actions in disrupting U.S. carrier networks anticompetitive nor impose a stop payment order. In addition, on its own motion, the Bureau sought further comment on whether it should extend the stop payment order to any U.S. carrier with any direct arrangements with Digicel Tonga Ltd. (Digicel) for international termination services in Tonga. Finally, the Bureau noted that there are U.S. carriers that have alternative arrangements with third parties to provide service on the U.S.-Tonga route. The Bureau noted that AT&T argued that an "appropriate remedy, to reduce the adverse effects on the U.S. market from the circuit disruption and rate increase, would be to order U.S. carriers to pay no more than the FCC benchmark rate of $0.19 to terminate calls to Tonga, including calls routed via third countries." On July 15, 2009, TCC filed an application for review of the Bureau's order. *See Petition of AT&T Inc. for Settlements Stop Payment Order on the U.S.-Tonga Route*, Application for Review, IB Docket No. 09-10 (filed July 15, 2009). AT&T and Verizon filed Oppositions to TCC's application for review. *Petition of AT&T Inc. for Settlements Stop Payment Order on the U.S.-Tonga Route,* AT&T Opposition to Application for Review, IB Docket No. 09-10 (filed July 30, 2009); *Petition of AT&T Inc. for Settlements Stop Payment Order on the U.S.-Tonga Route,* Verizon Opposition to Application for Review, IB Docket No. 09-10 (filed July 31, 2009).

[34] *Petition of AT&T Inc. for Settlements Stop Payment Order on the U.S.-Tonga Route*, Second Order and Request for Further Comment, IB Docket No. 09-10, DA 09-2422 (rel. Nov. 16, 2009).

[35] *See* Letter from James J.R. Talbot, General Attorney, AT&T to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Apr. 15, 2011) (*AT&T Status Report*); Letter from Jacquelynn Ruff, Vice President, International Public Policy & Regulatory Affairs, Verizon to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission (dated Apr. 13, 2011) (*Verizon Status Report*).

[36] *See Joint Petition Public Notice*.

[37] *See Joint Petition* at 3.

[38] *See Joint Petition* at 8-10.

current market developments support the removal of the ISP. Two of the Joint Petitioners, AT&T and Verizon, have subsequently reaffirmed their request for Commission action on the *Joint Petition*.[39]

13. We propose to remove the ISP from all U.S. international routes, with the exception of Cuba, which is the only international route currently listed in the Commission's "Exclusion List." State Department policy guidelines provide for the continued application of the ISP and the appropriate benchmark rate to Cuba, subject to waivers of limited duration.[40] As discussed above, the concern underlying the ISP is that foreign carriers not be permitted to discriminate against and "whipsaw" U.S. carriers or engage in other anticompetitive conduct that results in unnecessarily high rates to U.S. consumers. The *Joint Petition*, however, argues that the ISP may increase the rates for some remaining routes by preventing U.S. and foreign carriers from negotiating lower rates. Indeed, we have no record of any carrier setting rates at or below benchmark level on any U.S. international route that remains subject to the ISP since the petitioners filed their petition.

14. We believe that the petitioners demonstrate a sufficient basis to consider further action beyond the *2004 ISP Reform Order* and request comment on removing the ISP from virtually all remaining U.S. international routes to which it continues to apply. We agree with petitioners that the market has seen significant competitive growth since the Commission adopted the *1997 Benchmarks Order* and the *2004 ISP Reform Order*.[41] The petitioners also point out that the Commission retains the ISP on a small number of routes that account for less than two percent of total U.S.-outbound international traffic, and that maintaining the ISP on these routes impedes the carriers' ability to negotiate lower rates on those routes.[42] Petitioners contend that the requirements of the ISP obstruct U.S. carrier rate negotiations to a greater extent in the current market because foreign carriers on ISP routes have little or no incentive to agree to symmetrical rates when they can send their U.S.-bound traffic at much lower market rates through lower refile or traffic reorigination arrangements.[43] The petitioners further contend

[39] Comments of AT&T Inc. on Joint Petition (filed Oct. 6, 2008); Letter from Amy L. Alvarez, Executive Director, AT&T to Marlene Dortch, Secretary, Federal Communications Commission, Docket Nos. 09-10, 04-112, RM-11322, 08-65, 96-115 (dated Mar. 10, 2009); Letter from Amy L. Alvarez, Executive Director, AT&T to Marlene Dortch, Secretary, Federal Communications Commission, Docket Nos. 09-10, 04-112, RM-11322, 09-51, 09-47 (dated Feb. 26, 2010). *See also* Letter from Jacquelynn Ruff, Vice President, International Public Policy and Regulatory Affairs, Verizon to Marlene Dortch, Secretary, Federal Communications Commission, Docket Nos. 04-398, 09-10, RM-11322, 05-254, 04-112 (dated Apr. 23, 2010).

[40] The Commission's "Exclusion List" identifies countries and facilities that are not covered by the grant of global section 214 authority under section 63.18(e)(1) of the Commission's rules. Carriers desiring to serve countries or use facilities included on the Exclusion List must file a separate application pursuant to section 63.18(e)(3). Cuba continues to be identified on the list as a country for which a separate application is required pursuant to section 63.18(e)(3). The Commission has stated that it will process applications for the provision of telecommunications services to Cuba on a non-streamlined basis and coordinate with the State Department prior to action. The Commission's procedures are specified in a Public Notice issued on January 21, 2010 by the International Bureau, and implement revised policy guidance from the State Department on licensing for the provision of telecommunications services between the United States and Cuba. *See Modification of Process to Accept Applications for Service to Cuba and Related Matters*, Public Notice, DA 10-112 (rel. Jan. 21, 2010) (Int. Bur. 2010) (attaching letter from Ambassador Philip Verveer, U.S. Coordinator for International Communications and Information Policy, U.S. Department of State to Julius Genachowski, Chairman, Federal Communications Commission (dated Jan. 12, 2010)). In addition to addressing the coordination process for applications for service to Cuba, the State Department policy guidelines provide for the continued application of the ISP and the appropriate benchmark rate to Cuba, subject to waivers of limited duration.

[41] *See, e.g.*, *Joint Petition* at 1. The Commission recognized many of the same market changes in the *2004 ISP Reform Order*. *See 2004 ISP Reform Order*, 19 FCC Rcd at 5717-5720, ¶¶ 18-23.

[42] *See Joint Petition* at 2, 5, n.9.

[43] *Id.* at 2-8.

that, where U.S. carriers do negotiate symmetrical rate arrangements, U.S. carriers may be worse off under our current rules because they may pay higher rates to those ISP destinations than third-country carriers pay at the foreign end of ISP-exempt routes. They state that since the implementation of the *2004 ISP Reform Order*, on the other hand, U.S. carriers have been able to negotiate commercial arrangements on routes no longer subject to the ISP, develop more efficient and innovative termination arrangements, and improve services to U.S. consumers.[44] The petitioners further argue that U.S. carriers now compete in a largely deregulated world, and that removing the ISP from a route is more likely to lower rates than continuing the ISP on a limited number of routes.[45] They maintain that, while the Commission retained the ISP on non-benchmark compliant routes in 2004 because of higher rates and more limited development of market forces on those routes, the burdens associated with retaining the ISP on those routes now outweigh the benefits of this policy.[46] We find that petitioners have demonstrated a sufficient basis to consider further action beyond the *2004 ISP Reform Order*.

15. We initiate this proceeding and request comments on the petitioners' contentions. We seek comment on whether removal of the ISP from virtually all of the remaining ISP routes will, on balance, result in lower rates and otherwise benefit U.S. consumers. We request comment on whether there are any competitive concerns on a particular U.S. international route that we should consider prior to removing the ISP from that route. We propose removing the ISP from the remaining international routes, with the exception of Cuba. We believe this action will provide U.S. carriers greater flexibility to negotiate lower settlement rates on those routes.

16. Removing the ISP from the U.S. international routes except Cuba would require amendments to certain Commission rules, and we therefore seek comment on alternatives for amending the Commission's rules, including Sections 64.1001, 64.1002 and 43.51. Sections 64.1001 and 64.1002 specify the requirements and procedures that implement the ISP. Section 43.51 specifies the contract filing requirements that apply to U.S. carriers. We propose to amend section 64.1001 and portions of section 64.1002 which currently codify the ISP and related procedures in the Commission's rules. We also propose to modify section 43.51 of our rules to reflect the removal of the ISP on all routes except Cuba.

17. We propose, however, to require that U.S. carriers file agreements, amendments to agreements (whether written or oral), and rates for the provision of services (hereinafter referred to collectively as "agreements") when the agreed-upon rates are above benchmark. The requirement would apply to all U.S. international routes involving any foreign correspondent,[47] dominant or non-dominant, for which U.S. outbound rates are above benchmark regardless of whether the ISP previously had been removed from that route or benchmarks had been temporarily achieved at some point in the past. We propose that the filing requirement also apply when any provision in the contract has the effect of bringing the settlement rate above benchmark even though the stated contract rate is at or below benchmark. We believe that maintaining a contract filing requirement for U.S. carrier agreements that are not benchmark-compliant provides a measured approach to provide the Commission continued oversight of above-benchmark routes. The Commission would consider actions in response to above-benchmark situations on an *ad hoc* basis.[48] In this regard, we seek comment on factors the Commission should take into consideration in deciding whether to take action on an above-benchmark U.S. international route.[49]

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[44] *Id.* at 6.

[45] *Id.*

[46] *See Joint Petition* at 6-8.

[47] A foreign correspondent is the foreign carrier with which the U.S. carrier exchanges traffic.

[48] *See 2004 ISP Reform Order*, 19 FCC Rcd at 5730-31, ¶ 44. *See also* Sections B.3. and C. *supra* and *infra*.

[49] *See 2004 ISP Reform Order*, 19 FCC Rcd at 5729-34, ¶ 41-52.

Furthermore, upon the filing of an agreement implementing an above-benchmark rate, the International Bureau would issue a public notice of the filing. The public notice would remind carriers generally, and in particular those that provide service on the subject U.S. international route, that they are also required to file agreements if their rates are above benchmarks. We therefore request comment on requiring U.S. carriers to notify the Commission of all above-benchmark rates with all foreign carriers by filing their agreements for the provision of switched services traffic with those foreign carriers.

18. Finally, we propose retaining the Commission's authority to require U.S. carriers to file agreements, amendments to agreements (whether written or oral) and rates for the provision of services on international routes involving any foreign correspondent at any time and upon reasonable request.[50] We further propose to retain our current practice of considering any such agreement filed pursuant to the ISP available for public inspection, and considering all other such agreements not routinely available for public inspection.[51] The text of our proposed rule changes appear in Appendix A. We request comment on these proposed rule changes.

19. Alternatively, rather than requiring the filing of an agreement, we request comment on requiring U.S. carriers to file a notice of any agreement or amendment (whether written or oral) that includes rates that are above benchmark. The requirement would apply to all U.S. international routes regardless of whether the ISP previously had been removed from that route or benchmarks had been temporarily achieved at some point in the past. This approach would give the Commission the authority to require a U.S. carrier to file the agreement, amendments and rates in particular circumstances, but would not require U.S. carriers to file all agreements, amendments and rates with the Commission. The Commission might exercise that authority where there is a competitive concern on a particular route or where the Commission receives a complaint from a carrier or from a consumer with respect to that route. The text of the proposed rule changes for this alternative approach appears in Appendix A.

20. Although we are considering amendments to the ISP, we do not plan to amend the "No Special Concessions" Rule.[52] We reserve the right to require the filing of particular contracts when presented with evidence of a violation of the "No Special Concessions" rule or of other anticompetitive behavior related to these matters on a particular route.[53]

21. Finally, while the petitioners recognize that the primary function of the ISP has been to deter anticompetitive conduct by foreign carriers that may harm U.S. consumers, they point out that the Commission already has other competitive safeguards in its rules and is now considering possible improvements in these procedures.[54] Because removing the ISP would eliminate a tool the Commission has used to protect U.S. consumers from anti-competitive conduct, we will also consider ways to improve our competitive safeguards procedures and remedies to allow the Commission to respond to competitive concerns in a more timely, efficient and tailored manner. We seek comment on the issues, alternatives and proposals below with respect to both application of our rules to safeguard competition and our benchmarks policy.

B. Enhanced Competitive Safeguards

22. In 2005, the Commission issued a Notice of Inquiry that sought comment on ways to improve the process available to the Commission to protect U.S. consumers from the effects of

[50] *Id.* at 5736, ¶ 58.

[51] *See* 47 C.F.R. § 0.457(d)(1)(v).

[52] *See* 47 C.F.R. § 63.14.

[53] *See 2004 ISP Reform Order*, 19 FCC Rcd at 5736, ¶ 58.

[54] *See Joint Petition* at 8-9, citing *Modifying the Commission's Process to Avert Harm to U.S. Competition and U.S. Customers Caused by Anticompetitive Conduct*, IB Docket No. 05-254, Notice of Inquiry, FCC 05-152, 20 FCC Rcd 14096 (2005) (*2005 NOI*).

anticompetitive conduct by foreign carriers.[55] Comments in response to the NOI questioned whether our current procedures permit us to act effectively enough to avert blockages and disruptions on U.S. international circuits.[56] The record reflects that there may be additional, more tailored remedies that could be more effective under certain circumstances than the ones the Commission has employed in the past to prevent or respond to circuit blockages. Many of those comments were filed in 2005, however, and the record needs to be refreshed to reflect carriers' current practices and competitive concerns. Accordingly, we seek additional comment on alternatives and related issues to improve our existing procedures to better respond to threats of circuit disruptions and to petitions and complaints submitted by U.S. carriers that allege anticompetitive behavior on the part of foreign carriers.

23. We note that Section 64.1002(d) of the Commission's rules which we propose to reform would require amendment if the Commission decided to revise its procedures and safeguards.[57] We seek comment below on alternatives for amendment of the current Section 64.1002(d) based on any recommended changes to our procedures and remedies.

1. Presumption of Anticompetitive Behavior

24. As discussed above, the Commission sought to give U.S. carriers greater flexibility to negotiate commercial arrangements with foreign carriers by exempting benchmark-compliant U.S. international routes from the ISP in the *2004 ISP Reform Order*. By encouraging market-based arrangements, the Commission sought to promote greater competition in the U.S. international market and ensure more favorable calling rates for U.S. consumers.[58] The Commission recognized, however, the need to protect competition and respond to anticompetitive conduct. Thus, the Commission identified three indicia of anticompetitive conduct: (1) increasing settlement rates above benchmarks, (2) establishing rate floors, even if below benchmarks, that are above previously negotiated rates, or (3) threatening or carrying out circuit disruptions to achieve rate increases or changes to the terms and conditions of termination agreements.[59] Additionally, the Commission established a rebuttable presumption of harm to the public interest if U.S. carriers demonstrate in their petitions that they have suffered network disruptions by foreign carriers with market power in conjunction with their allegations of anticompetitive behavior or "whipsawing."[60]

25. We seek further comment on what additional acts, if any, the Commission should presume to constitute anticompetitive behavior. Specifically, we seek comment on AT&T's and MCI's argument that the Commission should have a broad definition of the types of circuit disruptions that the Commission should presumptively treat as anti-competitive conduct.[61]

26. We note that, in the *2004 ISP Reform Order*, the Commission found that blockage or disruption of U.S. carrier networks by foreign carriers directly harms the public interest, leads to decreases in call quality or completion and to potential increases in calling prices.[62] The Commission further found that resorting to such retaliatory abuse of market power against U.S. carriers, as opposed to resolving disagreements through commercial negotiations, is unlikely ever appropriate or justified in the

[55] *See 2005 NOI*; *International Settlement Policy Reform; International Settlement Rates,* IB Docket Nos. 02-324, 96-261, First Report and Order, FCC 04-53, 19 FCC Rcd 5709, 5728-34, ¶¶ 39-52 (2004) (*2004 ISP Reform Order*).

[56] *See, e.g.*, *2005 NOI*, 20 FCC Rcd at 14100, ¶ 9.

[57] *See* 47 U.S.C. §64.1002(d).

[58] *See 2004 ISP Reform Order* 19 FCC Rcd at 5711, ¶ 2.

[59] *Id.* at 5730-31, ¶ 44.

[60] *Id*. at 5731, ¶ 45.

[61] *See, e.g.,* AT&T Comments at 5-10; MCI Comments at 5, 7.

[62] *See 2004 ISP Reform Order*, 19 FCC Rcd at 5731, ¶ 45.

public interest and does not benefit the provision of international services to consumers in the United States or abroad. As a result, the Commission established a rebuttable presumption of harm to the public interest if U.S. carriers demonstrate in their petitions that they have suffered network disruptions by foreign carriers with market power in conjunction with their allegations of anticompetitive behavior.

27. We seek comment on whether we should extend the presumption that circuit blockages constitute anticompetitive behavior to partial circuit blockages. Should the presumption be limited to foreign carriers with market power or apply to all foreign carriers? What evidence should the complaining carrier be required to present of the partial blockage and how it was anticompetitive? For example, the complaining carrier could present evidence that the partial blockage or slowdown coincided with negotiations or a new demand for a rate increase or other consideration. How should the foreign carriers be provided the opportunity to present evidence that the partial circuit blockage was not anticompetitive behavior (*i.e.*, in reply comments or in an *ex parte* letter anytime thereafter)?

28. Likewise, we seek comment on whether there should be a presumption that threats of circuit blockage should be considered anticompetitive and whether the complaining carrier should be required to provide evidence of the threat and its anticompetitive nature. Should the complaining carrier be required to file an affidavit as evidence that there was a credible threat? What opportunities should be made available to a foreign carrier to present evidence to the contrary? While a foreign carrier could present evidence in reply comments or in an *ex parte* letter, we seek comment as to what other methods or evidence, if any, the Commission should permit foreign carriers to submit in response to allegations of anticompetitive conduct.

29. We seek comment on the notion that not all attempts to refuse or limit traffic termination constitute anticompetitive behavior.[63] The *2005 NOI* invited comment on whether there were instances in which circuit blockages might be appropriate.[64] In response, we received different views on how the exercise of contractual rights interplays with a determination as to whether anticompetitive conduct may be taking place in the form of retaliation for refusal to agree to settlement rate demands.[65] We seek comment on the typical structure and terms of current operating agreements and on how the Commission might consider contractual issues when considering allegations of anticompetitive conduct.

2. Procedure

30. Pursuant to the *2004 ISP Reform Order,* and under the Commission's current rules, the Commission may respond to anticompetitive behavior in response to complaints or petitions filed by U.S. carriers or other affected parties alleging anticompetitive behavior on a U.S. international route that will harm U.S. consumers.[66] If the Commission responds to a complaint or petition, the Commission considers these complaints and petitions on a case-by-case basis following issuance of a public notice.[67] If U.S. carriers or other parties can demonstrate harm to U.S. competition or U.S. consumers, the Commission may find that the actions of the foreign carrier with market power (or a group of foreign carriers that collectively have market power) constitute anticompetitive behavior.[68] We seek comment on the effectiveness of this complaint process, including the appropriateness of the current pleading cycle.

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[63] *See* MCI Comments at 4-6, 6 at n.15, 8.

[64] *See 2005 NOI*, 20 FCC Rcd at 14100, ¶ 8.

[65] *See, e.g.,* AT&T comments at 8-9; MCI Comments at 4-8, 6, n.15.; Jamaica Ministry Comments at 5-6; AT&T Reply 6-7; Cable & Wireless Jamaica Reply at 3; CANTO Reply at 5.

[66] 47 C.F.R. § 64.1002(d); *2004 ISP Reform Order*, 19 FCC Rcd at 5732-5733, ¶¶ 39-52. Under our rules, a petitioning carrier must file its commercial agreements with its petition in order to give all interested parties, including foreign carriers or governments, an opportunity to comment. *Id.* at 5732-33, ¶ 50.

[67] *Id*.

[68] *See Order on Review*, 19 FCC Rcd 9993; *2003 Bureau Order*, 18 FCC Rcd 3519.

31. In addition, we also consider the terms and procedure under which the Commission may act on its own motion to address anticompetitive behavior. Some suggested that the Commission should not act on its own motion and should intervene only where a U.S. carrier requests action.[69] Others argued that a regulator must be able to take unilateral action where service is disrupted due to circuit blockage.[70] We propose that the Commission should maintain its ability to act on its own motion because the Commission's objective to protect consumers could be hindered without this ability.[71] We seek comment on this issue.

32. We seek further comment on the following procedures to expedite Commission action to respond more effectively and to prevent anticompetitive behavior:

33. *Comment Cycle*. The current pleading cycle for U.S. carrier petitions requesting Commission intervention on a particular route is ten days for comments and seven days for replies.[72] We seek comment on whether a different timeline would be preferable. Several commenters to the *2005 NOI* proposed that the Commission adopt a shorter comment cycle of five days for comment and two for replies to allow the Commission to act in a more timely manner in response to carrier complaints.[73] CANTO argued, however, that a shorter pleading cycle would make it more difficult for a foreign carrier to meaningfully participate in the proceeding, which would therefore make it more difficult for the Commission to evaluate allegations of anticompetitive conduct.[74] AT&T responded that expedited procedures would be consistent with due process requirements.[75] We seek comment on maintaining the existing pleading cycle, which appears to appropriately balance the need for the Commission to act quickly when presented with evidence of anticompetitive behavior given current market realities and the interest in receiving full information and allowing the foreign carrier to participate meaningfully in the proceeding.

34. Sprint argued that the Commission should be prepared to grant relief on an immediate, *ex parte* basis to be effective.[76] Sprint maintained that a pleading cycle with time for comments, replies and an explanatory decision will not be effective because in that amount of time circuits can be blocked, coerced arrangements signed and U.S. international traffic shifted from the blocked to the unblocked carriers.[77] We note that section 63.1002(d) already provides for Commission grant of relief on an immediate basis (*i.e*., without comment and reply).[78] We seek comment on when, and under what circumstances, the Commission should exercise this authority.

35. *Public Notice and Notice to Foreign Carriers*. We note that, consistent with court and Commission precedent, formal notification to the foreign carriers is not required.[79] CANTO argued that

[69] *See* AT&T Comments at 14.

[70] *See* JCTA Comments at 2-3.

[71] *See 2004 ISP Reform Order,* 19 FCC Rcd at 5730, 5734, ¶¶ 44, 52.

[72] *See* 47 C.F.R. § 64.1002(d); *2004 ISP Reform Order*, 19 FCC Rcd at 5733, ¶ 51.

[73] *See* AT&T Comments at 11; JCTA Comments at 2-3; and MCI Comments at 8.

[74] *See* CANTO Comments at 10-11; CANTO Reply at 4.

[75] *See* AT&T Reply at 8.

[76] *See* Sprint Comments at 4-5.

[77] *See* Sprint Comments at 3-6.

[78] 47 C.F.R. §64.1002(d).

[79] *See Cable & Wireless v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999); *Philippines Order on Review* and *2004 ISP Reform Order*.

there is little justification for not notifying the foreign carrier.[80] We propose to adopt a requirement that a U.S. carrier should make a reasonable attempt to serve the subject foreign carrier at the time the U.S. carrier files a request for action under section 64.1002(d), but such a requirement would not prevent the Commission from acting to prevent harm from anticompetitive behavior on a route. In addition, some commenters argued that the Commission must provide a public notice immediately upon receiving a complaining carrier's notification or other credible information.[81] We request input regarding whether the Commission should release a public notice upon a formal request for Commission intervention by a U.S. carrier. The public notice of the formal request could reference the U.S. carrier's prior notification.

36. *Notice to Commission*. We seek comment on how quickly the Commission should require U.S. carriers to report circuit blockages to the Commission. We further seek comment on whether the Commission should require U.S. carriers to report to the Commission within a certain timeframe if they are unable to reach agreement on a settlement rate at or below the applicable benchmark rate. Finally, we seek comment on what other reporting requirements might alert the Commission to potential anticompetitive behavior on a U.S. international route in a timely manner.

3. Remedies

37. Upon a finding of anticompetitive behavior, the Commission may direct U.S. carriers to renegotiate with foreign carriers, direct U.S. carriers to withhold payment to foreign carriers, or restrict U.S. carriers from paying a specific rate.[82] The Commission may also reinstate the requirements of the ISP on a route from which it has been lifted.[83] Our rules also provide that in the event significant, immediate harm to the public interest is likely to occur that cannot be addressed through *ex post facto* remedies, the Commission may impose temporary requirements on U.S. carriers without prejudice to its findings on such petitions.[84]

38. Commenters to the *2005 NOI* suggested a variety of additional potential remedies that the Commission may use upon a finding of anticompetitive behavior by a foreign carrier. Each potential remedy is addressed below.

39. *Prohibit Increased Payments*. Some commenters suggested that the Commission should respond to threats of or actual anticompetitive behavior by prohibiting any increase of payments to a foreign carrier engaging in anticompetitive conduct until such conduct ceases, while others oppose this approach as inappropriate interference in commercial negotiations[85]

40. We seek comment on whether this remedy is appropriately tailored in most circumstances to prevent a foreign carrier from receiving a benefit as a result of its anticompetitive behavior while allowing continued payments at the preexisting rate. One potential benefit of this remedy is that it could create an environment in which the parties might be more likely to keep circuits open during ongoing negotiations. We propose that the Commission consider this to be the remedy of choice under most circumstances when there is anticompetitive behavior on a U.S. international route. We seek comment on this proposal and further seek comment on when this remedy might be less appropriate and/or fail to provide the proper incentive for a foreign carrier to cease anticompetitive behavior.

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[80] *See* CANTO Comments at 4.

[81] *See* JCTA Comments at 3.

[82] *See*, *e.g.*, *2004 ISP Reform Order*, 19 FCC Rcd at 5731-32 ¶ 47.

[83] *See*, *e.g., id*.

[84] 47 C.F.R. § 64.1002(d).

[85] See AT&T Comments at 16-18; JCTA Comments at 4 (supporting Commission prohibition of payment increases to a foreign carrier); CANTO Comments at 5-6 (opposing Commission prohibition of payment increases to a foreign carrier).

41. *Increase U.S. Inbound Rates*. Several commenters proposed that the Commission require U.S. carriers to increase inbound rates when a foreign carrier unreasonably increases termination rates.[86] We do not at this time propose this as a potential remedy based on the previous record established. However, we seek comment on how this remedy may work and when it may be appropriately used.

42. *Reimpose ISP*. Several commenters opposed the use of reimposition of the ISP as a remedy.[87] Because we propose in this NPRM both to remove the ISP from all but one route and to strengthen our ability to effectively respond to instances of anticompetitive behavior, we believe the re-imposition of the ISP as a potential remedy would not be appropriate. We seek comment on this issue.

43. *Government-to-Government Communication*. Some commenters argued that government-to-government contact should be the Commission's preferred response when there are concerns regarding anticompetitive behavior.[88] While we agree that the Commission should continue government-to-government communication in appropriate circumstances, the Commission should not be limited to such government-to-government communication when responding to anticompetitive behavior on the part of a foreign carrier. Commission actions would continue to be coordinated with overall government actions as it has in the past in situations where a foreign carrier has disrupted the circuits of U.S. carriers.

44. *214 Authorizations*. MCI noted that the Commission can exercise its jurisdiction over a carrier that holds a section 214 or other license or authorization granted by the Commission when the Commission finds the carrier to have acted in an anticompetitive manner.[89] We propose to reserve the Commission's authority to revoke or place limitations on section 214 authorizations in instances where the carrier or its affiliate is engaging in anticompetitive behavior. We seek comment on what circumstances should trigger such revocations or limitations.[90]

45. *Prohibit Termination of Traffic*. MCI suggested that the Commission could prohibit U.S. carriers from carrying or terminating traffic from foreign carriers found to be acting in an anticompetitive manner.[91] MCI argued that this would raise the foreign carrier's costs of acting anticompetitively that would counteract the perceived benefits of anticompetitive behavior.[92] Although we encourage parties to keep circuits open while negotiating the terms of an operating agreement, we propose that the Commission should include the prohibition to carry or terminate traffic as a potential remedy. We seek comment on what circumstances or anticompetitive activity might warrant such a remedy.

46. *Full Stop Payment Orders*. Some commenters argued that a full stop payment order, a remedy that the Commission has used in the past when a carrier is found to be engaging in anticompetitive behavior,[93] can be counterproductive.[94] We note, however, that both AT&T and Verizon

[86] *See* AT&T Comments at 19; MCI Comments at 13-14; JCTA Comments at 3; AT&T Reply at 11.

[87] *See* AT&T Comments at 18-19; Sprint Comments at 6-7; AT&T Reply at 10-11; CANTO Reply at 8.

[88] *See* CANTO Comments at 5; Digicel Comments at 4; CANTO Reply at 2-3. See also AT&T Comments at 12-14.

[89] *See* MCI Comments at 10.

[90] *See, e.g.,* 47 C.F.R. 63.10(e) (requiring that a foreign carrier's settlement rates be at or below benchmark as a condition of allowing a U.S. affiliate to provide U.S. international service between the United States and any foreign country where the foreign carrier possesses market power).

[91] *See* MCI Comments at 13-14.

[92] *Id*.

[93] *See generally Philippines Order on Review*, 19 FCC Rcd at 9993, ¶¶ 1-2; *2003 Philippines Bureau Order*, 18 FCC Rcd at 3519, ¶ 1.

[94] *See* AT&T Reply at 10; CANTO Reply at 8.

requested such action with respect to the Tonga route in 2008.[95] We recognize that a full stop payment order has limitations and, in some circumstances, could hinder negotiations to re-open circuits. However, we believe that the Commission should maintain this as a potential remedy. We seek comment on this proposal. We also seek comment regarding under what circumstances a full stop payment order would be an effective remedy and under what circumstances it would be counterproductive.

47. *"No Payment Orders."* Sprint proposed that the Commission should establish a remedy of no-payment for a specified period by all U.S. carriers for any international traffic terminated with a foreign carrier (including refiled traffic through third party carriers) upon a finding that any U.S. carrier had its circuits blocked as a result of the foreign carrier's whipsawing behavior.[96] We propose below in Section III.C a somewhat similar remedy. We request further comment on Sprint's proposed remedy of a "no payment" order in light of the proposal below. We seek comment on the circumstances under which the use of a "no payment" orders might be appropriate. We also request comment in Section III.C below on the extension of our benchmarks policy to indirect routing arrangements.

48. *WTO*. One party argued that if the Commission believes that a country has adopted a surcharge in violation of its WTO commitments, the only appropriate place to raise that concern would be through WTO enforcement mechanisms.[97] We note, however, that the Commission is not limited to relying on WTO dispute resolution procedures to respond to whipsawing behavior.[98] Indeed, the D.C. Circuit has affirmed that the Commission has authority to address such behavior by applying necessary safeguards to a route.[99] We retain our ability to exercise this authority if there also appears to be a WTO violation in connection with the alleged anticompetitive behavior.

C. Application of Benchmarks to Indirect Routing Arrangements

49. In specific, limited circumstances, we propose to apply benchmark rates to indirect routing arrangements that U.S. carriers have with third-party carriers in other countries to provide services on U.S. international routes. This approach was recently proposed by AT&T in the Tonga proceeding.[100]

50. *Background*. Under arrangements for reorigination of U.S. traffic, U.S. carriers terminate traffic in a destination country by routing calls through an intermediate country.[101] That is, U.S.-

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[95] *See Petition of AT&T Inc. for Settlements Stop Payment Order on the U.S.-Tonga Route,* IB Docket No. 09-10, Order and Request for Further Comment, 24 FCC Rcd 8006 (Int. Bur. 2009) (*Tonga Stop Payment Order*). TCC filed an application for review of the *Tonga Stop Payment Order*. *Petition of AT&T Inc. for Settlements Stop Payment Order on the U.S.-Tonga Route,* TCC Application for Review, IB Docket No. 09-10 (filed July 15, 2009). AT&T and Verizon filed oppositions to TCC's Application for Review. *Petition of AT&T Inc. for Settlements Stop Payment Order on the U.S.-Tonga Route,* AT&T Opposition to Application for Review, IB Docket No. 09-10 (filed July 30, 2009); *Petition of AT&T Inc. for Settlements Stop Payment Order on the U.S.-Tonga Route,* Verizon Opposition to Application for Review, IB Docket No. 09-10 (filed July 31, 2009).

[96] *See* Sprint Comments at 5-6.

[97] *See* Cable and Wireless Jamaica Comments at 10.

[98] *See* AT&T Reply at 12.

[99] *See, e.g., Cable & Wireless P.L.C.*, 166 F.3d 1224, 1226-1227 (D.C. Cir. 1999) ("The FCC has long sought to protect U.S. carriers and U.S. consumers from the monopoly power wielded by foreign telephone companies in the international telecommunications market."). *See also* AT&T Reply at 12.

[100] *See Petition of AT&T Inc. for Settlements Stop Payment Order on the U.S.-Tonga Route*, IB Docket No. 09-10, Second Order and Request for Further Comment, DA 09-2422 (rel. Nov. 16, 2009); AT&T Comments, IB Docket No. 09-10 at 5 (filed Jan. 6, 2010); AT&T Comments, IB Docket No. 09-10 (filed July 8, 2009); *but see* Digicel Comments, IB Docket No. 09-10 (filed Jan. 6, 2010); TCC Comments, IB Docket No. 09-10 (filed Jan. 6, 2010); TCC Reply, IB Docket No. 09-10 (filed July 23, 2009).

[101] U.S. carriers may or may not know the location of the destination country under reorigination arrangements.

originated international calls are routed through a carrier located in an intermediate country with which the U.S. carrier has a correspondent relationship. The intermediate country carrier accepts the U.S. traffic and terminates it with a carrier in the destination country as its own traffic under settlement arrangements that it has with the carrier in the destination country. The U.S. carrier makes a settlement payment to the intermediate country carrier to arrange for the termination of its traffic, but does not make a settlement payment to the carrier in the destination country.

51. *Legal Authority*. The Commission did not reach the issue of whether to apply benchmarks to indirect routing arrangements in its *1997 Benchmarks Order*. We believe, however, that the Commission has the legal authority to do so. First, the Communications Act authorizes the Commission to regulate foreign telecommunications services. The Act states that Congress created the FCC "[f]or the purpose of regulating interstate and foreign commerce in communication."[102] The Act also states it "shall apply to all interstate and foreign communication…which originates and/or is received within the United States."[103] The Act defines "foreign communication" as "communication transmission from or to any place in the United States to or from a foreign country."[104] Congress has mandated that "[a]ll charges, practices, classifications, and regulations for and in connection with the provision of "interstate or foreign communication by wire or radio" be "just and reasonable."[105] The Act also gives the Commission authority to prescribe just and reasonable charges upon finding that a charge or practice associated with a U.S. carrier providing foreign communications is unlawful.[106] Finally, the Commission may "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the Act], as may be necessary in the execution of [the FCC's] functions."[107]

52. In addition, the Commission has found previously that it has the authority to establish settlement rates. In its *2004 ISP Reform Order*, the Commission found that "[t]he Commission has previously held, and the courts have confirmed, that the Commission has jurisdiction to adopt settlement rate benchmarks for U.S. carriers, under the Communications Act and relevant case law."[108] The Commission determined that above-cost settlement rates paid by U.S. carriers to terminate international traffic are neither just nor reasonable, and it acted pursuant to its statutory authority in Section 201(b) of the Communications Act to prohibit U.S. carriers from continuing to pay such charges.[109] The Commission also concluded in the *Benchmarks Order* that its benchmarks are consistent with international obligations of the United States, and do not violate international comity.[110] Furthermore, the Commission made it clear that it does not, through its benchmarks, assert extra-territorial regulation over foreign carriers because benchmarks are a constraint on U.S. carriers only.[111] Moreover, as explained in

[102] 47 U.S.C. § 151.

[103] 47 U.S.C. § 152(a).

[104] 47 U.S.C. § 153(17).

[105] 47 U.S.C. §§ 201(a) & (b).

[106] 47 U.S.C. § 205.

[107] 47 U.S.C. § 154(i).

[108] *See 2004 ISP Reform Order*, 19 FCC Rcd at 5742, ¶ 74.

[109] *Benchmarks Order*, 12 FCC Rcd at 19932-39, ¶¶ 276-86.

[110] *Benchmarks Order*, 12 FCC Rcd at 19949-52, ¶¶ 309-14; aff'd on recon, 14 FCC Rcd at 9260-9264, ¶¶ 12-24.

[111] *Benchmarks Order*, 12 FCC Rcd at 19949-52, ¶¶ 309-14.

the *Benchmarks Order*, the policy is fully consistent with U.S. trade obligations under the GATS.[112] The D.C. Circuit Court affirmed the Commission's *Benchmarks Order* in these respects.[113]

53. As a result, we believe that the Commission has the authority to impose the policy enunciated in the *Benchmarks Order* on U.S. carriers reoriginating traffic on an indirect basis through intermediate foreign carriers to the destination country. In the *Benchmarks Order*, the Commission asserted jurisdiction over international telecommunications services that are settled under a settlement rate agreed to by a U.S. carrier and its foreign correspondent as clearly falling "within the definition of 'foreign communication' under the Act because such telecommunications services either originate or terminate in the United States."[114] The Commission's *Benchmarks Order* was challenged by several parties asserting that the Order unlawfully asserts regulatory authority over foreign telecommunications services and foreign carriers wishing to serve the U.S. market. The *Benchmarks Order* was upheld on appeal, with the court holding that the Commission's Order "does not regulate foreign carriers or foreign telecommunications services and therefore does not violate the Communications Act."[115] We regard the U.S. carrier traffic delivered to a destination country under reorigination arrangements as a "foreign communication" under the Act. The Commission has traditionally determined the jurisdictional nature of a service by applying an "end to end" analysis based upon the endpoints of a communication, "beginning with the inception of a call to its completion."[116] In addition, the Commission has previously asserted jurisdiction over indirect routing arrangements[117] and required U.S. carriers to obtain authority under Section 214 of the Act to provide U.S. international services whether using direct circuits to reach a

[112] *Id.* at 19924-28, ¶¶ 260-67.

[113] *See, e.g., Cable & Wireless v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999). The D.C. Circuit rejected the argument that the benchmarks policy unlawfully asserts regulatory authority over foreign telecommunications services and foreign carriers. The court noted that "the Commission does not exceed its authority simply because a regulatory action has extraterritorial consequences." The court thus found the *Benchmarks Order* "does not violate the Communications Act." *Id.* at 1230.

[114] *Benchmarks Order*, 12 FCC Rcd at 19934, ¶ 278; *see also Benchmarks Order*, 12 FCC Rcd at 19818, ¶ 26 ("The Communications Act provides us with the authority to reform U.S. carrier participation in international settlement rate practices in the manner we adopt in this *Order.*").

[115] *Cable & Wireless. v. FCC*, 166 F.3d 1224, 1230 (D.C. Cir. 1999).

[116] *Petition for Declaratory Ruling That Pulver.com's Free World Dial-Up is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd 3307, 3320-21 (2004).

[117] *See, e.g., Foreign Carrier Entry Order,* 11 FCC Rcd 3873*,* ¶¶ 165-170 (1995) (permitting authorized U.S. international carriers to engage in "switched hubbing" of U.S.-inbound and U.S.-outbound switched traffic subject to conditions to ensure non-discriminatory treatment among U.S. carriers in the "hub" (*i.e.*, intermediate) country); *see also id.* at 3938-39, ¶ 170 (requiring U.S. carriers that route U.S.-outbound traffic via switched hubbing to "tariff their service on a 'through' basis from the United States to the ultimate foreign destination, just as they tariff any other IMTS [international message telephone service] offering"); *Foreign Participation Order*, 12 FCC Rcd 23891, 23931, ¶ 86, 23962, ¶ 166, n.322 (1997) (amending and reaffirming the "switched hubbing" rule); *Implementation and Scope of the International Settlements Policy for Parallel International Communications Routes*, Order on Reconsideration, 2 FCC Rcd 1118, 1121, ¶ 22 CC Docket No. 85-204 (rel. Feb. 19, 1987)("In the Report and Order, we concluded that the application of our international settlements policy should be expressly extended to include indirect transit traffic as well as direct traffic."); *Common Carrier Services; Implementation and Scope of the Uniform Settlements Policy*, Report and Order, 1986 WL 226455, 4744, ¶ 31, CC Docket No. 85-204; RM-4796; FNC 86-30 (rel. Feb. 7, 1986) ("While we have not to date stringently regulated the terms of indirect traffic routes, we have noted that such service is clearly meant only as a substitute for direct traffic, and as such should be held to similar standards of uniformity and fairness.").

particular destination country or routing traffic indirectly to a particular country through an intermediate foreign point.[118]

54. *Discussion.* We propose to apply the Commission's benchmark policy on a case-by-case basis to indirect routing on international routes that are found to be subject to anticompetitive conduct by foreign carriers where additional remedies are required. The effectiveness of stop payment orders applying to direct traffic can be undermined where carriers in the destination country on international routes subject to the order are otherwise able to enjoy above-benchmark rates as a result of reorigination of U.S. traffic. Under these circumstances, the anticompetitive conduct is likely to continue. We therefore request comment on application of benchmark rates to alternative routing arrangements involving the reorigination of U.S. carrier traffic through intermediate country carriers on an international route where the Commission has made findings of anticompetitive conduct sufficient to order all U.S. carriers to suspend payments for termination services to carriers in the destination country.

55. In applying benchmark rates to reorigination of traffic under the limited circumstances specified above, we would not permit any U.S. carrier serving the international route indirectly to pay a fee to a third-party carrier in an intermediate country for reorigination of traffic greater than the established benchmark rate for termination of traffic to the destination country. We would not impose the restriction except after prior notice and opportunity for comment. The Commission would provide notice and opportunity for comment as part of the order suspending U.S. carrier payments for termination services with carriers in the destination country. We believe that existing benchmark rates would be a sufficient cap on fees paid by U.S. carriers for reorigination of traffic to a destination country on an international route where there is continuing anticompetitive conduct. According to the Commission's 2009 International Telecommunications Data Report, the average U.S. settlement payout per minute (world total for U.S. carriers) was $0.054[119] compared to the range of per minute benchmark rates established in 1997: $0.15 (for upper-middle income countries); $0.19 (for low-middle income countries); and $0.23 (for low income countries).[120] The notice and comment process described above would give affected carriers an opportunity to contest the reasonableness of application of the benchmark rate for charges above the benchmark rate applicable to the particular destination route subject to the notice. If adopted, the restriction would be imposed by order and removed upon a finding that the anticompetitive

[118] An early example of a Section 214 certificate authorizing a carrier to provide service to a particular destination country using direct circuits, and to use the same circuits to provide service indirectly to "points beyond" that country, can be found in Tropical Radio Telegraph Co., 35 FCC 2d 950 (1972) (granting Tropical Radio Telegraph Company Section 214 authority to acquire and operate one satellite voice circuit between an earth station in Etam, West Virginia and an appropriate satellite to be interconnected with a similar circuit between the satellite and an earth station near Rome, Italy, furnished by ITALCABLE, for use in providing its regularly authorized services to the public between the United States and Italy "and points beyond"). More than two decades later, the Commission confirmed, in response to carrier inquiries, that its rules and policies permit carriers to provide service on an indirect, switched transit (or "and beyond") basis through intermediate countries which they are authorized to serve on a direct, facilities basis, "unless the carrier's [S]ection 214 certificate for the intermediate country prohibits routing of traffic beyond that point, whether generally, or to specific terminal points." Streamlining the International Section 214 Authorization Process and Tariff Requirements, IB Docket No. 95-118, *Notice of Proposed Rulemaking*, FCC 95-286, 10 FCC Rcd 13477, 13484, ¶ 17 & n. 22 (1995) (*214 Streamlining NPRM*). As part of its efforts to streamline the international Section 214 authorization process, the Commission proposed in the *214 Streamlining NPRM* to adopt procedures to authorize the provision of facilities-based service on a global, rather than a country-specific basis, which "would apply to both direct and indirect switched services and eliminate uncertainty about the need for carriers to obtain 'and beyond' authority to provide indirect service." *Id*. at 13484, ¶ 17. The Commission ultimately adopted its proposal, with certain modifications. *See* IB Docket No. 95-118, Report and Order, FCC 96-79, 11 FCC Rcd 12884, 12886-12893, ¶¶ 3-19 (1996).

[119] FCC's 2009 *Annual Section 43.61 International Telecommunications Data Report* available at http://www.fcc.gov/ib/sand/mniab/traffic/.

[120] *Benchmarks Order*, 12 FCC Rcd at 19815-16, ¶ 19.

conduct on the international route had ceased or under other circumstances that the Commission determined appropriate based upon the record in a particular case.

56. Our purpose in proposing this two-step approach to remedying anticompetitive conduct is to protect U.S. consumers from the effects of such continuing conduct should initial remedies prove ineffective. By limiting the fee that U.S. carriers pay to intermediate-country carriers to convey traffic originated in the United States to destination countries to an amount no higher than the benchmark rate, we would protect U.S. consumers from above-benchmark termination rates that in effect would be passed on to them through reorigination fees paid by their U.S. carrier. In deciding whether to impose a benchmark cap on reoriginating traffic, we would consider an appropriate, short transition period for carriers to negotiate arrangements compliant with our order;[121] any need for specific contract reporting requirements to reflect renegotiated arrangements; and other issues raised relevant to imposition of the benchmark cap under the circumstances particular to the route.

57. As in our *Benchmarks Order*, we emphasize that in applying benchmark rates to reorigination of U.S. carrier traffic, we would not be asserting authority over either the foreign carrier in the destination country or the third-party foreign carrier reoriginating U.S. outbound traffic.[122] We propose here to apply our jurisdiction only over the reorigination fees that U.S. carriers pay on international routes subject to findings of continuing anticompetitive conduct, with prior opportunity for notice and comment and based upon circumstances and findings specific to the international route involved.

58. We request comment on the proposal described above. We also request comment on whether there may be other circumstances under which the Commission should apply benchmark rates to alternative or indirect routing arrangements. In particular, we request comment on a broader approach than that described above if such an approach would allow the Commission to more effectively respond to anticompetitive behavior under certain circumstances. We request comment on whether the Commission also should impose benchmarks on alternative or indirect routing arrangements in instances where there are high rates substantially above benchmarks on a U.S. international route for a prolonged period of time with no foreseeable progress in lowering rates. We request comment on what criteria the Commission should use in making a determination as to whether benchmarks should apply to indirect routing arrangements on a particular route. We anticipate that such an approach would involve a notice-and-comment proceeding investigating the specific circumstances of the international route involved. We also request that parties offer alternative proposals regarding such circumstances. We further request comment on the effectiveness of such an approach.

D. Other Issues

59. Finally, we note that some commenters to the *2005 NOI* and commenters in the proceeding regarding the U.S.-Tonga route argued that U.S. carriers have failed to decrease retail calling rates in proportion to the decrease in settlement rate reductions.[123] Commenters argued that this alleged failure to decrease retail calling rates in proportion to any settlement rate reduction harms U.S. consumers and carriers in foreign countries because U.S. consumers pay higher rates than necessary, which results in

[121] Since we are proposing limited case-by-case application of benchmarks to alternative routing arrangements, we are not proposing that U.S. carriers be required to negotiate benchmark compliant reorigination fees on all international routes pursuant to the structured process provided for in our *Benchmarks Order*, 12 FCC Rcd at 19879-19889.

[122] *See Benchmarks Order*, 12 FCC Rcd at 19551 in which the Commission made it clear that it was not asserting authority to compel a foreign carrier to charge a certain rate for terminating U.S. originated traffic. *See also Cable & Wireless*, 166 F.3d at 1224.

[123] *See* Cable and Wireless Jamaica Comments at 15-16; CANTO Comments at 11; Digicel Comments at 4-5. *See also* Digicel Comments, IB Docket No. 09-10.

lower traffic volumes and reduced terminating revenues received by foreign carriers on the international route.[124] U.S. carriers disputed this argument. Specifically, AT&T maintained that U.S. carriers have fully passed through reductions in settlement rates, and that carrier price reductions have exceeded their reductions in settlement costs by more that 160% in a six-year period.[125] Sprint stated that the pass-through argument fails to take into account the fact that international carriers incur costs other than transit and termination costs such as those for marketing, customer acquisition and retention, bad debt, and fraud.[126] In response to the contention that rate decreases are not passed through to end users, MCI argued that the international telecommunications market that U.S. carriers participate in is so competitive that carriers cannot price services significantly above their marginal costs without losing consumers to competing providers.[127] MCI stated that the appropriate response to concerns over U.S. carrier rates to U.S. consumers would not be to condone anticompetitive practices by foreign carriers.[128] Furthermore, AT&T and Verizon both argued that the rates U.S. carriers charge to U.S. consumers have no relevance to the Commission's determination of whether a foreign carrier has acted anticompetitively.[129]

60. Section 43.61 traffic and revenue data filed by U.S. carriers show that, on average, U.S. carriers appear to have been flowing through settlement rate reductions in U.S. international calling rates. From 1996 to 2009 (comparing the year before the FCC adopted benchmarks to the most recent year for which data are available), the average IMTS[130] settlement rate paid by U.S. carriers decreased by $0.37 per minute, while the average IMTS revenue per minute (an estimate of the average U.S. international calling rate) decreased by $0.66 per minute, more than flowing through settlement rate reductions.[131] We recognize that this data has certain limitations and may underestimate the level of U.S. international calling rates to some degree. For instance, the IMTS revenue per minute figure is based on revenue reported by facilities-based carriers and, therefore, reflects a mix of wholesale and retail rates. Also, some carriers may not have included non-route-specific calling plan revenue in their revenue figures. We also note that the figures cited above are average numbers and that settlement rates reductions may not have been flowed through uniformly to all segments of the retail market. There is evidence that some

[124] *See* Cable and Wireless Jamaica Comments at 15-16; CANTO Comments at 11; Digicel Comments at 4-5; Digicel Comments, IB Docket No. 09-10.

[125] *See* AT&T Comments at 20-21.

[126] *See* Sprint Reply at 6-7.

[127] *See* MCI Comments at 14-15; MCI Reply at 4-7.

[128] *See* MCI Reply at 4-7.

[129] *See* AT&T Comments, IB Docket No. 09-10 at 19-21 (filed July 8, 2009); Verizon Comments, IB Docket No. 09-10 at 14-15 (filed July 24, 2009); AT&T Opposition to Application for Review, IB Docket No. 09-10 at 11-13 (filed July 30, 2009); Verizon Opposition to Application for Review, IB Docket No. 09-10 at 4-7 (filed July 30, 2009).

[130] IMTS refers to International Message Telephone Service and is defined as the provision of message telephone service (MTS) between the United States and a foreign point. The term "message telephone service" refers to the transmission and reception of speech and low-speed dial-up data over the public switched telephone network (PSTN).

[131] Based on calculations from the most recent compilation of international traffic and revenue data published by the Commission, the average U.S. carrier settlement payout per minute was $0.054 and the average IMTS revenue per minute was $0.080, based on all facilities-based IMTS carriers and all international points. *See* FCC's 2009 *International Telecommunications Data* (*Section 43.62 Report*), Table A1 (World Total) available at http://www.fcc.gov/ib/mniab/traffic/. For 1996, the average U.S. carrier settlement payout per minute was $0.428 per minute and the average IMTS revenue per minute was $0.739. *See* FCC's 1996 *Section 43.62 Report*, Table A1 (World Total). The reduction in the average settlement payout per minute over the time period was therefore $0.37, and the reduction in the average IMTS revenue per minute was $0.65.

U.S. carriers, between 1985 and 2000, increased the retail "basic rates"[132] they charged consumers. Nevertheless, the section 43.61 data covers the entire U.S. facilities-based IMTS industry and all international routes, and shows average IMTS revenue per minute falling much *more* than the average settlement rate payout. We seek comment on this issue. In addition to the decrease in the average IMTS settlement rate paid by U.S. carriers as well as a decrease in the average IMTS revenue per minute received by U.S. carriers, what other data or factors should we consider in evaluating whether U.S. carriers are passing on reductions in settlement rates to the retail rates they charge consumers? What action, if any, should the Commission consider taking with respect to these issues?

IV. PROCEDURAL ISSUES

A. Ex Parte

61. This proceeding shall be treated as a "permit but disclose" proceeding in accordance with the Commission's *ex parte* rules.[133] Persons making oral ex parte presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More that a one- or two-sentence description of the views and arguments presented is generally required.[134] Other rules pertaining to oral and written presentations are set forth in Section 1.1206(b) of the Commission's rules as well.

B. Initial Regulatory Flexibility Analysis

62. Pursuant to the Regulatory Flexibility Act (RFA),[135] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the proposals considered in this NPRM. The text of the IRFA is set forth in Appendix B. Written public comments are requested on this IRFA. Comments must be filed in accordance with the same filing deadlines for comments on the NPRM, and they should have a separate and distinct heading designating them as responses to the IRFA. The Commission will send a copy of the NPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[136]

C. Initial Paperwork Reduction Act of 1995 Analysis

63. This document contains proposed new and modified information collection requirements. The Commission, as a part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

D. Filing of Comments and Reply Comments

64. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first

[132] Retail "basic rates" are default rates consumers must pay if they do not enter into monthly contracts for international communications services.

[133] 47 C.F.R. §§ 1.1200, 1.1206; Amendment of 47 C.F.R. § 1.1200 *et seq.* Concerning Ex Parte Presentations in Commission Proceedings, GC Docket No. 95-21, *Report and Order*, 12 FCC Rcd 7348 (1997).

[134] 47 C.F.R. § 1.1206(b)(2).

[135] *See* 5 U.S.C. § 603. The RFA has been amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[136] 5 U.S.C. § 603(a)

page of this document. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://fjallfoss.fcc.gov/ecfs2/ or the Federal eRulemaking Portal: http://www.regulations.gov.

- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

65. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

66. People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

67. All parties must file one copy of each pleading electronically or by paper to each of the following:

(1) The Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW, Room CY-B402, Washington, D.C. 20554, (202) 488-5300, or via e-mail to fcc@bcpiweb.com.

(2) James Ball, Chief, Policy Division, International Bureau, 445 12th Street, S.W., Washington, D.C. 20554; e-mail: James.Ball@fcc.gov.

(3) David Krech, Associate Chief, Policy Division, International Bureau, 445 12th Street, S.W., Washington, D.C. 20554; e-mail: David.Krech@fcc.gov.

(4) Kimberly Cook, Attorney, Policy Division, International Bureau, 445 12th Street, S.W., Washington, D.C. 20554; e-mail Kimberly. Cook@ fcc.gov.

(5) Mark Uretsky, Economist, Policy Division, International Bureau, 445 12th Street, S.W., Washington, D.C. 20554; e-mail Mark.Uretsky@ fcc.gov

68. Filings and comments will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, S.W., Room CY-A257, Washington, D.C. 20554. They may also be purchased from the Commission's duplicating

contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554, telephone: (202) 488-5300, fax: (202) 488-5563, or via e-mail www.bcpiweb.com. They will also be accessible through the Commission's Electronic Filing System (ECFS) on the Commission's website, www.fcc.gov.

69. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with section 1.49 and all other applicable sections of the Commission's rules.[137] All parties are encouraged to utilize a table of contents, to include the name of the filing party and the date of the filing on each page of their comments' length of their submission. We also strongly encourage that parties track the organization set forth in the Further Notice of Proposed Rulemaking in order to facilitate our internal review process.

70. Written comments by the public on the proposed and/or modified information collections are due 60 days from the date of publication of the Notice in the Federal Register. Written comments must be submitted by the public, Office of Management and Budget (OMB), and other interested parties on the proposed and/or modified information collections on or before 60 days after the date of publication in the Federal Register of the Notice. In addition to filing comments with the Secretary, Marlene H. Dortch, a copy of any comments on the information collection(s) contained herein should be submitted to Judith B. Herman, Federal Communications Commission, Room 1-C804, 445 12th Street, SW, Washington, DC 20554, or via the Internet to Judith.BHerrman@fcc.gov. and to Kim A. Johnson, OMB Desk Officer, Room 10236 NEOB, 725 17th Street, N.W., Washington, DC 20503 or via the Internet to Kim_A._Johnson@omb.eop.gov.

71. Commenters that file what they consider to be proprietary information may request confidential treatment pursuant to section 0.459 of the Commission's rules. Commenters should file both their original comments for which they request confidentiality and redacted comments, along with their request for confidential treatment. Commenters should not file proprietary information electronically. *See Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd 24816 (1998), Order on Reconsideration, 14 FCC Rcd 20128 (1999). Even if the Commission grants confidential treatment, information that does not fall within a specific exemption pursuant to the Freedom of Information Act (FOIA) must be publicly disclosed pursuant to an appropriate request. *See* 47 C.F.R.§ 0.461; 5 U.S.C. § 552. We note that the Commission may grant requests for confidential treatment either conditionally or unconditionally. As such, we note that the Commission has the discretion to release information on public interest grounds that falls within the scope of a FOIA exemption.

V. ORDERING CLAUSES

72. IT IS ORDERED that, pursuant to the authority contained in 47 U.S.C. Sections 151, 152, 154(i), 154(j), 201-205, 208, 211, 214, 303(r), 309 and 403 this *Notice of Proposed Rulemaking* is ADOPTED.

73. IT IS FUTHER ORDERED that NOTICE IS HEREBY GIVEN of the proposed regulatory changes to Commission policy and rules described in this Notice of Proposed Rulemaking and that comment is sought on these proposals.

[137] 47 C.F.R. § 1.49.

74. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Proposed Rules

It is proposed that Parts 0, 43 and 64 of the Commission rules be amended as follows:

PART 0 – COMMISSION ORGANIZATION

1. **The authority citation for part 0 continues to read as follows:**

AUTHORITY: Secs. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155.

2. **Section 0.453 is amended by revising paragraph (e)(6) to read as follows:**

§ 0.453 Public reference rooms.

* * * * *

(e) * * *

* * *

(6) Contracts and other arrangements filed under §43.51(b)(3) of this chapter, except for those that are filed with a request for confidential treatment (see §0.459) or are deemed confidential pursuant to sec. 412 of the Communications Act (see also §0.457(c)(3)).

* * * * *

3. **Section 0.457 is amended by revising paragraph (d)(1)(v) to read as follows:**

§ 0.457 Records not routinely available for public inspection.

* * * * *

(d) * * *

* * *

(v) The rates, terms and conditions in any agreement between a U.S. carrier and a foreign carrier that govern the settlement of U.S. international traffic, including the method for allocating return traffic, except for any agreement with a foreign carrier presumed to have market power, and subject to the international settlements policy set forth in Part 64, Subpart J of this chapter.

* * * * *

Part 43 – REPORTS OF COMMUNICATION COMMON CARRIERS AND CERTAIN AFFILIATES

4. **The authority citation for part 43 continues to read as follows:**

AUTHORITY: 47 U.S.C. 154; Telecommunications Act of 1996, Pub. L. 104-104, secs. 402(b)(2)(B), (c), 110 Stat. 56 (1996) as amended unless otherwise noted, 47 U.S.C. 211, 219, 220 as amended.

5. Section 43.51 is amended by revising the introductory language in paragraph (a)(1), and paragraphs (a)(2) and (b)(3), adding (b)(4), revising paragraph (c), removing and reserving paragraph (d); revising paragraphs (e) and (f); and amending note 3 to 43.51, and removing note 4 to 43.51 to read as follows:

§ 43.51 Contracts and concessions.

(a)(1) Any communication common carrier described in paragraph (b) of this section must file with the Commission, within thirty (30) days of execution, a copy of each contract, agreement, concession, license, authorization, operating agreement or other arrangement to which it is a party and amendments thereto (collectively hereinafter referred to as "agreement" for purposes of this rule) with respect to the following:

* * *

(2) If the agreement is made other than in writing, a certified statement covering all details thereof must be filed by at least one of the parties to the agreement. Each other party to the agreement which is also subject to these provisions may, in lieu of also filing a copy of the agreement, file a certified statement referencing the filed document. The Commission may, at any time and upon reasonable request, require any communication common carrier not subject to the provisions of this section to submit the documents referenced in this section.

(b) * * *

(3) A carrier, other than a provider of commercial mobile radio services, that is engaged in foreign communications, if (i) the agreement is for an international route on the Commission's "Exclusion List," and (ii) the agreement is with a foreign carrier that is presumed to have market power on the foreign end of the route, pursuant to Note 3 to this section. The Commission's "Exclusion List" identifies countries and facilities that are not covered by the grant of global section 214 authority under section 63.18(e)(1) of the Commission's rules. This list is available at http://www.fcc.gov/ib/pd/exclusion_list.pdf; or

(4) A carrier, other than a provider of commercial mobile radio services, that is engaged in foreign communications and enters into an agreement with a foreign carrier, if (i) the agreement provides for a settlement rate above the applicable benchmark rate, or (ii) any provision in the contract has the effect of bringing the settlement rate above the applicable benchmark rate. The Commission established applicable benchmark rates in *International Settlement Rates*, IB Docket No. 96-261, Report and Order, FCC 97-280, 12 FCC Rcd 19806, 19860 ¶ 111 (1997) (*Benchmarks Order*); Report and Order on Reconsideration and Order Lifting Stay, 14 FCC Rcd 9256 (1999) (*Benchmarks Reconsideration Order*); *aff'd sub nom. Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999).

(c) * * *

(d) Agreements between a carrier and a foreign carrier that are not included in paragraph (b) of this section are not required to be filed with the Commission pursuant to paragraph (a) of this section, but each U.S. carrier subject to such an agreement shall maintain a copy of it, and upon request by the Commission, shall promptly forward individual agreements to the Commission.

(e) Other filing requirements for carriers providing service on a U.S. international route that is subject to the international settlements policy as set forth in §64.1002 of this chapter:

(1) If a U.S. carrier files an agreement with a foreign carrier pursuant to paragraph (a) and (b)(3) of this section to begin providing switched voice service between the United States and the foreign point, the

carrier must also file with the International Bureau a modification request under §64.1001 of this chapter. The operating or other agreement cannot become effective until the modification request has been granted under paragraph §64.1001(e) of this chapter.

(2) If a U.S. carrier files an amendment pursuant to paragraph (a) and (b)(3) of this section, to an existing operating or other agreement with a foreign carrier to provide switched voice service between the United States and a foreign point, and the amendment relates to the exchange of services, interchange or routing of traffic and matters concerning rates, accounting rates, division of tolls, the allocation of return traffic, or the basis of settlement of traffic balances, the carrier may need to file with the International Bureau a modification request under §64.1001 of this chapter. The amendment to the operating or other agreement cannot become effective until the modification request has been granted under §64.1001(e) of this chapter.

(f) *Confidential treatment.* (1) Agreements filed with the Commission pursuant to the requirements of paragraphs (a) and (b)(3) of this section shall be considered as routinely available for public inspection under §0.453(e)(6) of this chapter. Carriers may request confidential treatment under §§0.457 and 0.459 of this chapter for the rates, terms and conditions that govern the settlement of U.S. international traffic.

(2) Carriers requesting confidential treatment of agreements filed pursuant to paragraphs (a) and (b)(3) of this section must include the information specified in §64.1001(c) of this Chapter. Such filings shall be made with the Commission, with a copy to the Chief, International Bureau. The transmittal letter accompanying the confidential filing shall clearly identify the filing as responsive to §43.51(f).

(3) Agreements filed with the Commission pursuant to the requirements of paragraphs (a) and (b)(4) of this section shall be considered as not routinely available for public inspection pursuant to §0.457(d)(1)(v) (Any request that these materials be made available for public inspection must be under the provisions of §0.461 of this chapter.).

* * *

Note 3 to §43.51: Carriers shall rely on the Commission's list of foreign carriers that do not qualify for the presumption that they lack market power in particular foreign points for purposes of determining which of their foreign carrier contracts are subject to the contract filing requirements set forth in paragraphs (a) and (b)(3) of this section. The Commission's list of foreign carriers that do not qualify for the presumption that they lack market power in particular foreign points is available from the International Bureau's World Wide Web site at http://www.fcc.gov/ib. The Commission will include on the list of foreign carriers that do not qualify for the presumption that they lack market power in particular foreign points any foreign carrier that has 50 percent or more market share in the international transport or local access markets of a foreign point. A party that seeks to remove such a carrier from the Commission's list bears the burden of submitting information to the Commission sufficient to demonstrate that the foreign carrier lacks 50 percent market share in the international transport and local access markets on the foreign end of the route or that it nevertheless lacks sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market. A party that seeks to add a carrier to the Commission's list bears the burden of submitting information to the Commission sufficient to demonstrate that the foreign carrier has 50 percent or more market share in the international transport or local access markets on the foreign end of the route or that it nevertheless has sufficient market power to affect competition adversely in the U.S. market.

PART 64 – MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

6. The authority citation for part 64 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 254(k); secs. 403(b)(2)(B), (c), Public Law 104–104, 110 Stat. 56.

Interpret or apply 47 U.S.C. 201, 218, 225, 226, 228, and 254(k) unless otherwise noted.

7. Section 64.1001 is amended by revising paragraph (a) to read as follows:

§ 64.1001 Requests to modify international settlements arrangements.

(a) The procedures set forth in this rule apply to carrier requests to modify international settlement arrangements on any U.S. international route listed on the Commission's "Exclusion List." *See* http://www.fcc.gov/ib/pd/exclusion_list.pdf. Any operating agreement or amendment for which a modification request is required to be filed cannot become effective until the modification request has been granted under paragraph (e) of this section.

* * * * *

8. Section 64.1002 is amended by revising paragraph (a), removing and reserving paragraph (b) and amending paragraphs (c) and (d) to read as follows:

§ 64.1002 International settlements policy.

(a) A common carrier that is authorized pursuant to part 63 of this chapter to provide facilities-based switched voice service on a U.S. international route that is listed on the Commission's "Exclusion List" (http://www.fcc.gov/ib/pd/exclusion_list.pdf), and that enters into an operating or other agreement to provide any such service in correspondence with a foreign carrier that does not qualify for the presumption that it lacks market power on the foreign end of the route, must comply with the following requirements:

* * *

(b) [reserved].

(c)A carrier that seeks to exempt from the international settlements policy an international route on the "Exclusion List" must make its request to the International Bureau, accompanied by a showing that a U.S. carrier has entered into a benchmark-compliant settlement rate agreement with a foreign carrier that possesses market power in the country at the foreign end of the U.S. international route that is the subject of the request. The required showing shall consist of an effective accounting rate modification, filed pursuant to §64.1001, that includes a settlement rate that is at or below the Commission's benchmark settlement rate adopted for that country in IB Docket No. 96–261, Report and Order, 12 FCC Rcd 19,806, 62 FR 45758, Aug. 29, 1997, available on the International Bureau's World Wide Web site at http://www.fcc.gov/ib.

(d) A carrier or other party may request Commission intervention on any U.S. international route for which competitive problems are alleged by filing with the International Bureau a petition, pursuant to this section, demonstrating anticompetitive behavior that is harmful to U.S. customers. The Commission may also act on its own motion. Carriers and other parties filing complaints must support their petitions with evidence, including an affidavit and relevant commercial agreements. The International Bureau will review complaints on a case-by-case basis and take appropriate action on delegated authority pursuant to §0.261 of this chapter. Interested parties will have 10 days from the date of issuance of a public notice of the petition to file comments or oppositions to such petitions and subsequently 7 days for replies. In the event significant, immediate harm to the public interest is likely to occur that cannot be addressed through *post facto* remedies, the International Bureau may impose temporary requirements on carriers authorized pursuant to §63.18 of this chapter without prejudice to its findings on such petitions.

* * * * *

Alternative Proposed Rule

Part 43 – REPORTS OF COMMUNICATION COMMON CARRIERS AND CERTAIN AFFILIATES

9. The authority citation for part 43 continues to read as follows:

AUTHORITY: 47 U.S.C. 154; Telecommunications Act of 1996, Pub. L. 104-104, secs. 402(b)(2)(B), (c), 110 Stat. 56 (1996) as amended unless otherwise noted, 47 U.S.C. 211, 219, 220 as amended.

10. Section 43.51 is amended by revising the introductory language in paragraph (a)(1), and paragraphs (a)(2), (b)(3), (c), (d), (e), (f) and note 3 and removing note 4 to 43.51 to read as follows:

§ 43.51 Contracts and concessions.

(a)(1) Any communication common carrier described in paragraph (b) of this section must file with the Commission, within thirty (30) days of execution, a copy of each contract, agreement, concession, license, authorization, operating agreement or other arrangement to which it is a party and amendments thereto (collectively hereinafter referred to as "agreement" for purposes of this rule) with respect to the following:

* * *

(2) If the agreement is made other than in writing, a certified statement covering all details thereof must be filed by at least one of the parties to the agreement. Each other party to the agreement which is also subject to these provisions may, in lieu of also filing a copy of the agreement, file a certified statement referencing the filed document. The Commission may, at any time and upon reasonable request, require any communication common carrier not subject to the provisions of this section to submit the documents referenced in this section.

(b) * * *

(3) A carrier, other than a provider of commercial mobile radio services, that is engaged in foreign communications, if (i) the agreement is for an international route on the Commission's "Exclusion List," and (ii) the agreement is with a foreign carrier that is presumed to have market power on the foreign end of the route, pursuant to Note 3 to this section. The Commission's "Exclusion List" identifies countries and facilities that are not covered by the grant of global section 214 authority under section 63.18(e)(1) of the Commission's rules. This list is available at http://www.fcc.gov/ib/pd/exclusion_list.pdf.

(c) * * *

(d) A carrier, other than a provider of commercial mobile radio services, that is engaged in foreign communications, and enters into an agreement with a foreign carrier, must notify the International Bureau of any agreement within 30 days of the execution of the agreement, if (i) the agreement provides for a settlement rate above the applicable benchmark rate, or (ii) any provision in the contract has the effect of bringing the settlement rate above the applicable benchmark rate. The Commission has the authority to require the U.S. carrier providing service on U.S. international routes to file a copy of each agreement to which it is a party. The Commission established applicable benchmark rates in *International Settlement Rates*, IB Docket No. 96-261, Report and Order, FCC 97-280, 12 FCC Rcd 19806, 19860 ¶ 111 (1997) (*Benchmarks Order*); Report and Order on Reconsideration and Order Lifting Stay, 14 FCC Rcd 9256 (1999) (*Benchmarks Reconsideration Order*); *aff'd sub nom. Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999).

(e) Other filing requirements for carriers providing service on U.S. international routes that are subject to the international settlements policy as set forth in §64.1002 of this chapter:

(1) For routes subject to the international settlements policy set forth in §64.1002 of this chapter, if a U.S. carrier files an operating or other agreement with a foreign carrier pursuant to paragraph (a) of this section to begin providing switched voice, telex, telegraph, or packet-switched service between the United States and a foreign point, the carrier must also file with the International Bureau a modification request under §64.1001 of this chapter. The operating or other agreement cannot become effective until the modification request has been granted under paragraph §64.1001(e) of this chapter.

(2) For routes subject to the international settlements policy, if a carrier files an amendment, pursuant to paragraph (a) of this section, to an existing operating or other agreement with a foreign carrier to provide switched voice, telex, telegraph, or packet-switched service between the United States and a foreign point, and the amendment relates to the exchange of services, interchange or routing of traffic and matters concerning rates, accounting rates, division of tolls, the allocation of return traffic, or the basis of settlement of traffic balances, the carrier must also file with the International Bureau a modification request under §64.1001 of this chapter. The amendment to the operating or other agreement cannot become effective until the modification request has been granted under §64.1001(e) of this chapter.

(f) *Confidential treatment.* (1) Agreements filed with the Commission pursuant to the requirements of paragraphs (a) and (b)(3) of this section shall be considered as routinely available for public inspection under §0.453(e)(6) of this chapter. Carriers may request confidential treatment under §0.457 of this Chapter for the rates, terms and conditions that govern the settlement of U.S. international traffic.

(2) Carriers requesting confidential treatment under this paragraph must include the information specified in §64.1001(c) of this Chapter. Such filings shall be made with the Commission, with a copy to the Chief, International Bureau. The transmittal letter accompanying the confidential filing shall clearly identify the filing as responsive to §43.51(f).

* * *

Note 3 to §43.51: Carriers shall rely on the Commission's list of foreign carriers that do not qualify for the presumption that they lack market power in particular foreign points for purposes of determining which of their foreign carrier contracts are subject to the contract filing requirements set forth in paragraphs (a) and (b)(3) of this section. The Commission's list of foreign carriers that do not qualify for the presumption that they lack market power in particular foreign points is available from the International Bureau's World Wide Web site at http://www.fcc.gov/ib. The Commission will include on the list of foreign carriers that do not qualify for the presumption that they lack market power in particular foreign points any foreign carrier that has 50 percent or more market share in the international transport or local access markets of a foreign point. A party that seeks to remove such a carrier from the Commission's list bears the burden of submitting information to the Commission sufficient to demonstrate that the foreign carrier lacks 50 percent market share in the international transport and local access markets on the foreign end of the route or that it nevertheless lacks sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market. A party that seeks to add a carrier to the Commission's list bears the burden of submitting information to the Commission sufficient to demonstrate that the foreign carrier has 50 percent or more market share in the international transport or local access markets on the foreign end of the route or that it nevertheless has sufficient market power to affect competition adversely in the U.S. market.

APPENDIX B

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act (RFA),[1] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this Notice of Proposed Rulemaking (NPRM). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of this NPRM. The Commission will send a copy of this NPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[2] In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.[3]

A. Need for, and Objectives of, the Proposed Rules

75. In recent years there has been increased participation and competition in the U.S. international marketplace, decreased settlement and end-user rates, and growing liberalization and privatization in foreign markets. Because of this increase, the Commission believes that it is an appropriate time to re-examine its International Settlements Policy (ISP) and accounting rate policies. In this proceeding, the Commission expects to obtain further information about the competitive status of the U.S. international marketplace. In addition, the Commission solicits comment on a wide variety of proposals to reform its current application of the ISP, benchmark and settlement rate policies.

B, Legal Basis

76. The Notice of Proposed Rulemaking is authorized under 47 U.S.C. Sections 151, 152, 154(i), 154(j), 201-205, 208, 211, 214, 303(r), 309 and 403.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

77. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[4] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[5] A small business concern is one which: (1) is independently owned and operated, (2) is not dominant in its field of operation, and (3) satisfies any additional criteria established by the SBA.[6]

78. The proposals contained in the Notice of Proposed Rulemaking may directly affect up to approximately 38 facilities-based U.S. international carriers providing IMTS traffic. In the 2009 annual

[1] *See* 5 U.S.C. § 603. The FRA, *see* 5 U.S.C. § 601-612 has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. § 603(a).

[3] *See id.*

[4] 5 U.S.C. § 603(b)(3).

[5] 5 U.S.C. § 603(6).

[6] 5 U.S.C. § 603(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

traffic and revenue report, 38 facilities-based and facilities-resale carriers reported approximately $5.8 billion in revenues from international message telephone service (IMTS). Of these, three reported IMTS revenues of more than $1 billion, eight reported IMTS revenues of more than $100 million, 10 reported IMTS revenues of more than $50 million, 20 reported IMTS revenues of more than $10 million, 25 reported IMTS revenues of more than $5 million, and 30 reported IMTS revenues of more than $1 million. Based solely on their IMTS revenues the majority of these carriers would be considered non-small entities under the SBA definition.[7] Neither the Commission nor the SBA has developed a definition of "small entity" specifically applicable to these international carriers. The closest applicable definition provides that a small entity is one with 1,500 or fewer employees.[8] We do not have data specifying the number of these carriers that are not independently owned and operated and have fewer than 1,500 employees. Furthermore, because not all agreements between the U.S. and foreign carriers are required to be filed at the Commission, it is difficult to determine how many of these 38 carriers might have agreements with foreign carriers. The Notice of Proposed Rulemaking solicits comments on a wide variety of proposals, and the proposals are intended to promote market-based policies and reduce unnecessary regulatory burdens on all facilities-based U.S. international carriers regardless of size.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

79. The NPRM seeks a wide variety of information on the Commission's ISP, benchmarks and international settlement rates policies. In developing these policies, the Commission implemented various reporting requirements to monitor possible anticompetitive behavior and protect the public interest. The NPRM proposes retaining reporting requirements when carriers agree to above-benchmark rates. The NPRM reserves the right to require the filing of particular contracts when presented with evidence of a violation of the "No Special Concessions" rule or of other anticompetitive behavior related to these matters on a particular route. The NPRM solicits comment on whether the Commission should retain, eliminate or develop new/additional reporting requirements. The NPRM seeks comment on possible safeguards that could be implemented to address specific competitive concerns.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

80. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[9]

81. The proposals in this NPRM are designed to provide the Commission with information to determine whether its existing regulatory regime may inhibit the benefits of lower calling process and greater service innovations to consumers. Because the NPRM is broad and proposals would likely affect only 38 facilities-based carriers, it would be difficult to adopt specific alternatives for the small facilities-based entities. The proposals contained in the NPRM would benefit all entities, including small entities.

82. The NPRM does propose steps that would minimize the economic impact on all entities, including small entities. For example, the NPRM seeks comment on whether to remove the ISP from certain remaining routes. This proposal would eliminate the burden of seeking prior Commission approval before a carrier could enter into arrangements with foreign carriers. Any changes to our existing

[7] *See* 13 C.F.R. § 121.201, NAICS Code at Subsector 517 – Telecommunications.

[8] 13 C.F.R. § 121.201, NAICS codes 513310 and 513322.

[9] *See* 5 U.S.C. § 603(c).

policies and rules will expand the ability of all entities, including small entities, to reap the economic benefits of competition. Thus, the NPRM does not propose any exemption for small entities.

F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rule

83. None.

APPENDIX C

Exclusion List

Cuba